No. 92-190-CSX
Status: GRANTED

Title: United States, Petitioner
v.
Idaho, ex rel. Director, Idaho Department of Water Resources

Docketed:
July 28, 1992

Court: Supreme Court of Idaho

Counsel for petitioner: Solicitor General

Counsel for respondent: Echo-Hawk,Larry, Tucker,James C.

062292 ext til 072892 by O'Connor, J.-CITED 073092
Consulted Frank re respond.

Entry	Date	Note	Proceedings and Orders
1	Jun 19 1992	G	Application (A91-950) to extend the time to file a petition for a writ of certiorari from June 28, 1992 to July 28, 1992, submitted to Justice O'Connor.
2	Jun 22 1992		Application (A91-950) granted by Justice O'Connor extending the time to file until July 28, 1992.
3	Jul 28 1992	G	Petition for writ of certiorari filed.
5	Aug 20 1992		Order extending time to file response to petition until September 25, 1992.
6	Sep 8 1992	G	Motion of Nez Perce Tribe, et al. for leave to file a brief as amici curiae filed.
7	Sep 25 1992		Brief of respondent Idaho, ex rel. Director, Dept. of Water Resources in opposition filed.
8	Sep 30 1992		DISTRIBUTED. October 16, 1992
11	Oct 13 1992	X	Reply brief of petitioner filed.
9	Oct 19 1992		Motion of Nez Perce Tribe, et al. for leave to file a brief as amici curiae GRANTED.
10	Oct 19 1992		Petition GRANTED.
			**********
12	Oct 29 1992	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
13	Nov 9 1992		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
14	Dec 2 1992		Brief amici curiae of Nez Perce Tribe, et al. filed.
15	Dec 3 1992		Brief of petitioner United States filed.
16	Dec 28 1992		Record filed.
		*	Original proceedings Supreme Court of Idaho and District Court, Fifth Judicial District, Twinn Falls County(BOX)
17	Jan 7 1993		Brief of respondent Idaho filed.
18	Jan 7 1993		Brief amici curiae of Alaska, et al. filed.
20	Feb 4 1993		CIRCULATED.
21	Feb 8 1993	X	Reply brief of petitioner filed.
19	Mar 3 1993		SET FOR ARGUMENT MONDAY, MARCH 29, 1993.(4TH CASE)
22	Mar 29 1993		ARGUED.

Supreme Court, U.S.
FILED

92-190
No.

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF IDAHO, EX REL. DIRECTOR,
IDAHO DEPARTMENT OF WATER RESOURCES

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

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QUESTION PRESENTED

The McCarran Amendment allows joinder of the United States as a defendant in general stream adjudications, but specifically provides that "no judgment for costs shall be entered against the United States in any such suit." 43 U.S.C. 666(a). The question presented is whether, when a State joins the United States as a defendant in such a suit, the State may refuse to recognize the United States' water rights claims unless the United States pays "filing fees" to finance the State's costs in the adjudication.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Idaho Power Company, Twin Falls Canal Company, and North Side Canal Company participated as respondents in the Idaho Supreme Court.

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No.

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF IDAHO, EX REL. DIRECTOR,
IDAHO DEPARTMENT OF WATER RESOURCES

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the Supreme Court of Idaho in this case.

OPINIONS BELOW

The decision of the Idaho Supreme Court (App., *infra*, 1a-40a) is not yet reported. The judgment of the district court (App., *infra*, 41a-44a) and the memorandum decisions of the district court (App., *infra*, 45a-80a, 81a-89a, 90a-115a) are unreported.

JURISDICTION

The judgment of the Idaho Supreme Court was entered on March 30, 1992. On June 22, 1992, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including July 28, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

STATUTORY PROVISIONS INVOLVED

The McCarran Amendment provides in relevant part:

> § 666. Suits for adjudication of water rights
>
> (a) Joinder of United States as defendant; costs
>
> Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

43 U.S.C. 666(a).

Section 42-1414 of the Idaho Code provides in relevant part:

> § 42-1414. Fees for filing notice of claim.—In order to provide an adequate and equitable cost-sharing formula for financing the costs of adjudicating water rights the department of water resources shall accept no notice of claim * * * unless such notice of claim is submitted with a filing fee based upon the fee schedule set forth below. Failure to pay the variable water use fee in accordance with the timetable provided shall be cause for the department to reject and return the notice of claim to the claimant. * * *
>
> (1) Flat fee per claim filed:
>
> (a) Claims for domestic and or stockwatering rights $25.00
>
> (b) Claims for all other rights $50.00
>
> (2) Additional variable water use fee for claims filed based upon acreage, power generating capacity, c.f.s., or equivalent volume of water:
>
> (a) Irrigation use (one fee irrespective of number of claims): ..... $1.00 per acre
>
> (b) Power: .... $3.50 per kilowat of capacity (manufacturer's nameplate rating)
>
> (c) Aquaculture: ..... $10.00 per c.f.s.
>
> (d) Municipal, industrial, commercial, mining, heating, cooling: .. $100.00 per c.f.s.
>
> (e) Public instream flow, public lake level maintenance, wildlife: $100.00 per c.f.s.
>
> (3) * * * All fees collected by the department pursuant to this section shall be placed in the water resources adjudication account established in section 42-1777, Idaho Code.

Idaho Code § 42-1414 (1990).

STATEMENT

The McCarran Amendment allows a State to join the United States as a defendant in a suit for the adjudication of rights to the use of water of a river system or other source, but bars entry of any "judgment for costs" against the United States in such a

suit. 43 U.S.C. 666(a). Notwithstanding the McCarran Amendment's limited waiver of sovereign immunity and its specific prohibition on any "judgment for costs," the State of Idaho has revised its general stream adjudication procedures to require the United States to make extraordinary, multi-million dollar payments to finance the State's adjudication expenses.

Under Idaho's new procedures, participants in the adjudication, including the United States, must pay "filing fees" at the time they submit their notices of claims to water rights. Those variable fees are highest for the types of water rights claims frequently asserted by the United States and the Indian Tribes. When Idaho named the United States as a defendant in a general stream adjudication of the Snake River, the United States objected to the fee requirement—which would require the United States to pay Idaho an estimated $10 million in this case alone—arguing that the McCarran Amendment does not waive the United States' sovereign immunity from imposition of such fees. The Idaho District Court rejected the United States' argument, and a sharply divided Supreme Court of Idaho affirmed that decision.

1. Congress enacted the McCarran Amendment to facilitate the comprehensive determination of water rights through general stream adjudications in state courts. Enacted in 1952, the McCarran Amendment contains three principal provisions respecting the United States' waiver of sovereign immunity. First, the Amendment provides that the United States may be joined as a defendant in any suit

> (1) for the adjudication of rights to the use of water of a river system or other source, or
>
> (2) for the administration of such rights,

where it appears that the United States

> is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit.

43 U.S.C. 666(a). Second, it limits the United States' use of sovereign immunity as a defense on the merits, stating that when the United States has been properly joined in the above circumstances, the United States shall

> be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty.

43 U.S.C. 666(a). Third, the McCarran Amendment states that the United States shall be "subject to the judgments, orders, and decrees of the court having jurisdiction," *provided*

> That no judgment for costs shall be entered against the United States in any such suit.

43 U.S.C. 666(a).

At the time Congress enacted the McCarran Amendment, Idaho used judgments for costs to finance the State's expenses in general stream adjudication suits. See Idaho Code § 42-1401 (1948) (Idaho Exh. 247). Idaho's Department of Reclamation would make an examination of the stream and submit an itemized, verified statement of its expenses to the state auditor, who would present the statement to the state board of examiners. Expenses approved by the board would be paid out of general revenues. The state auditor would then certify those amounts to the court for inclusion as "part of the

costs and disbursements in said cause." Idaho Code § 42-1401 (1948). At the time of entry of final judgment, the court would

> adjudge and determine the proportionate amount of such cost of examination and survey to be paid by each of the parties to said suit * * *.

Idaho Code § 42-1401 (1948). The McCarran Amendment's "costs proviso" retained the United States' immunity from assessment under that financing mechanism.[1]

2. For many years, the State of Idaho and the Idaho Power Company have been engaged in a dispute over the utilization of water from the Snake River. See *Idaho Power Co.* v. *State*, 661 P.2d 741 (Idaho 1983). To resolve that longstanding dispute, the State of Idaho and the Idaho Power Company agreed to propose and support legislation authorizing a general adjudication of water rights in the Snake River basin. In 1985 and 1986, the Idaho Legislature enacted the proposed legislation, which provides that "the director of the department of water resources shall petition the district court to commence an adjudication within the terms of the McCarran Amend-

[1] The McCarran Amendment had the same effect in other western States, including Senator McCarran's own State of Nevada, which also used judgments for costs to recoup the State's expenses in conducting general stream adjudications. See 1943 Cal. Stat. 1631-1632 (Cal. Water Code §§ 2040-2043) (Idaho Exh. 245); Nev. Comp. Laws § 7930 (Bender-Moss 1929) (Idaho Exhs. 252-256); N.M. Stat. § 77-406 (1941) (Idaho Exhs. 257-258); N.D. Rev. Code § 61-0317 (1943) (Idaho Exh. 259); Okla. Stat. § 82-13 (West 1951) (Idaho Exh. 260); Or. Comp. Laws Ann. § 116-822 (1940) (Idaho 261-262); Utah Code Ann. § 100-4-20 (1943) (Idaho Exh. 265a-b); Wash. Rev. Stat. § 7371 (Remington 1932) (Idaho Exhs. 266-267).

ment." Idaho Code § 42-1406A(1) (1990). See generally *In re Snake River Basin Water System*, 764 P.2d 78, 81 (Idaho 1988), cert. denied, 490 U.S. 1005 (1989).

The state legislation revised Idaho's methods for financing its costs in water right adjudications. Specifically, the legislation states that the Director of Idaho's Department of Water Resources shall not accept a "notice of claim" from any water right claimant unless the notice is accompanied by a filing fee in accordance with a fee schedule set out in the statute. Idaho Code § 42-1414 (1990). "Failure to pay the variable water use fee in accordance with the timetable provided shall be cause for the department to reject and return the notice of claim to the claimant." Idaho Code § 42-1414 (1990).[2]

The monies collected as filing fees are "placed in the water resources adjudication account established in section 42-1777." Idaho Code § 42-1414(3) (1990). The Idaho Legislature annually appropriates the filing fees placed in that account "to pay the costs of the [Department of Water Resources] attributable to general water rights adjudications" and "to pay for judicial expenses directly related to the Snake River adjudication." Idaho Code § 42-1777(1) and (2) (1990). Idaho uses the funds placed in the adjudication account to pay not only the State's costs of processing, filing, and reporting on water rights claims, see, *e.g.*, R. 414-415, 421-423, but also various litigation costs that the State incurs in challenging such claims, including attorney salaries and expenses for investigations, evidentiary development, witnesses,

[2] Idaho first imposed filing fees in 1971, but the fees that Idaho imposed between 1971 and 1985 were nominal in amount. See Idaho Code § 42-221 (1977).

and service of process. See, *e.g.*, U.S. Exh. 3006, at 2-10, 51-55; R. 423-424; Tr. 376, 378-381, 547-553, 595.

Although the Idaho statute describes the fee structure as providing an "equitable cost-sharing formula for financing the costs of adjudicating water rights," Idaho Code § 42-1414 (1990), the variable filing fees fall more heavily upon sovereign claimants, such as the United States and Indian Tribes, that are entitled to file notices of claims to instream flows.[3] The United States has estimated that the Idaho statute would require that federal agencies pay more than $10 million in fees in the Snake River Basin Adjudication, and the bulk of those fees would be required for federal reserved water right claims, as distinguished from claims to water acquired under state law. See, *e.g.*, R. 246-262, 265-266, 271-287.

3. On June 17, 1987, the Director of the Idaho Department of Water Resources filed a petition in the District Court of the Fifth Judicial District naming the United States and all other water users of the Snake River basin as defendants. The district court formally commenced the adjudication by order dated November 19, 1987, see *In re Snake River Basin Water System*, *supra* (affirming the commencement order), and the Director has begun the process of receiving notices of water rights claims in accordance with

[3] Agricultural users pay the lowest variable fee—one dollar per acre irrigated, regardless of the amount of water diverted or consumed. Hydropower users are assessed a comparatively low fee of $3.50 per kilowatt of capacity, while entities claiming water for aquaculture are charged $10 per cfs (cubic foot per second). Entities claiming water for municipal, industrial, or commercial use and public entities seeking to maintain minimum instream flows are charged $100 per cfs. See Idaho Code § 42-1414 (1990).

Idaho law. See Idaho Code § 42-1408A to 42-1410 (1990). The district court established a schedule under which the United States' claims are filed on an agency-by-agency basis.

The United States has attempted to submit its notices of claims according to the court's schedule, but the Director has refused to file any notices not accompanied by filing fees. See Tr. 1180. On June 30, 1989, the United States filed a petition for a writ of mandamus to compel the Director to accept the United States' notices without filing fees. The petition asserted, *inter alia*, that the Director was under a duty to file the notices without accompanying filing fees because the McCarran Amendment does not waive the United States' immunity from assessment of fees in general stream adjudications. The district court entered a judgment denying the petition for a writ of mandamus after issuing a series of memorandum decisions rejecting the United States' specific contentions. App., *infra*, 41a-44a, 45a-80a, 81a-89a, 90a-115a.

The district court's second decision specifically rejected the United States' argument that the McCarran Amendment does not waive federal sovereign immunity from payment of the State's filing fees. The court stated that "[t]he ordinary, contemporary and common meaning of the language of *McCarran* is that Congress waived *all rights* to assert any facet of sovereign immunity in a general [stream] adjudication * * * which is being conducted in accordance with state law." App., *infra*, 86a (emphasis in original). The court concluded that the McCarran Amendment's "costs proviso" supported its result, reasoning that the Amendment "specifically exempts the United States from paying any 'judgment for costs,'" but contains "[n]o exception for filing fees." *Id.* at 88a.

4. The Idaho Supreme Court affirmed in a sharply divided decision. App., *infra*, 1a-40a. The three-judge majority concluded that the McCarran Amendment contains a clear and unambiguous waiver of federal sovereign immunity from filing fees, stating that the "language selection" in the amendment "clearly subjects the United States to all laws concerning an 'adjudication.'" *Id.* at 12a. The majority rejected constructions of the Amendment other than its own, stating that "[t]he employment of alternative statutory construction techniques is not required in analyzing 43 U.S.C. § 666(a) unless it is for the purpose of attempting to strain the plain statutory language to reach some pre-ordained result." *Ibid.*

The majority found no merit in the United States' suggestion that the McCarran Amendment's costs proviso demonstrated Congress's intent that the United States would not be subject to state filing fees. The court concluded that the McCarran Amendment protects the United States only from a judgment for costs and that "[f]ees do not come within the term costs" because "costs are the charges that a party may recover from the opponent" while "fees are those amounts paid to the court." App., *infra*, 14a. Justice Bistline wrote a separate concurring opinion in which he largely rejected the doctrine of federal sovereign immunity, but also stated that he was "not persuaded of any error in [the majority's] analysis." *Id.* at 26a.

Justices Johnson and Boyle wrote separate dissents. The two dissenters concluded that the McCarran Amendment does not waive the United States' immunity from payment of filing fees. See App., *infra*, 28a-29a, 29a-40a. Justice Johnson rejected the majority's distinction between filing fees and costs, observing that "[t]he 'filing fees' the state seeks to

charge the United States are not the usual modest fees for filing pleadings in a lawsuit." *Id.* at 28a. Rather, the United States was being required "to fund involuntarily a significant part of the cost of the SRBA [Snake River Basin Adjudication]" when the adjudication itself was "occasioned" by the settlement of a dispute between the State and Idaho Power Company and "[t]he United States is just along for the ride, pursuant to the McCarran Amendment." *Ibid.* Justice Johnson concluded:

> By the McCarran Amendment, the United States consented to joinder as a defendant in a "general adjudication." * * * The plain reading of the McCarran Amendment indicates that the United States did not waive its sovereign immunity to the payment of costs. * * * These "filing fees" are nothing more nor less than the State's costs for conducting the SRBA. By the McCarran Amendment, the United States waived its sovereign immunity only so far as being joined as a defendant, not so far as involuntarily paying the costs of the litigation.

Id. at 29a.

The other dissenter, Justice Boyle, objected that the majority's decision was inconsistent with "the Supreme Court's recent pronouncements" concerning waivers of sovereign immunity. App., *infra*, 30a. He explained that a waiver of sovereign immunity "must be grounded exclusively upon the statutory text" and must be "unequivocal." *Ibid.*, citing *United States* v. *Nordic Village, Inc.*, 112 S. Ct. 1011 (1992). Because it is "at least 'plausible'" to construe the McCarran Amendment as retaining the United States' immunity from state filing fees, App., *infra*, 38a, Judge Boyle concluded that the Amendment does not

provide an "unequivocal statutory waiver," *id.* at 40a.[4]

REASONS FOR GRANTING THE PETITION

The McCarran Amendment contains a carefully limited waiver of the United States' sovereign immunity. The statute disclaims federal immunity in three respects: it allows a State to join the United States as a defendant in a general stream adjudication suit; it restricts the United States' power to assert sovereign immunity to avoid state laws governing the appropriation of water; and it subjects the United States to the resulting state court judgments, subject to the proviso that "no judgment for costs shall be entered against the United States in any such suit." 43 U.S.C. 666(a). The Idaho Supreme Court has misinterpreted the McCarran Amendment in a way that is flatly inconsistent with this Court's precedents; greatly enlarges the scope of the waiver in a statute of broad applicability in numerous state courts; and allows States to circumvent the "costs proviso." The decision raises an important and recurring issue of federal-state relations that should be resolved in this case.

1. The Idaho Supreme Court's decision resolves the scope the United States' sovereign immunity through an analytical approach inconsistent with numerous rulings of this Court. As the Court has repeatedly stated, a waiver of the United States' sovereign immunity must be unequivocally expressed; waiver may not be implied, assumed, or based on speculation or ambiguity. *United States Dep't of Energy* v. *Ohio*,

[4] After the state supreme court's decision, the district court issued an order requiring the Director to accept the United States' claims without payment of fees, pending final resolution of the controversy.

112 S. Ct. 1627, 1633 (1992); *Block* v. *North Dakota*, 461 U.S. 273, 280 (1983); *United States* v. *King*, 395 U.S. 1, 4 (1969). And any waiver of the United States' immunity to suit must be construed "strictly in favor of the sovereign" and "not 'enlarged beyond what the language requires.'" *Nordic Village, Inc.*, 112 S. Ct. at 1015; *Library of Congress* v. *Shaw*, 478 U.S. 310, 318 (1986); accord *United States* v. *Sherwood*, 312 U.S. 584, 590 (1941).[5]

Moreover, the Court has consistently ruled that a waiver of federal sovereign immunity does not subject the United States to *monetary* liability unless that result is specifically and clearly intended. For example, in *Ohio*, the Court concluded that a provision of the Resource Conservation and Recovery Act (RCRA) that subjects the United States to "all Federal, State, interstate, and local requirements, both substantive and procedural, * * * in the same manner, and to the same extent, as any person is subject to such requirements," 42 U.S.C. 6961, is not "an explicit and unambiguous waiver of federal sovereign immunity from punitive fines." *Ohio*, 112 S. Ct. at 1639. The Court explained:

> We * * * agree with the Tenth Circuit that "all . . . requirements" "can reasonably be interpreted

[5] The Court has stated that asserted waivers of sovereign immunity must be "clear and unambiguous." *Hancock* v. *Train*, 426 U.S. 167, 179 (1976); *EPA* v. *California*, 426 U.S. 200, 211 (1976); see also *Mayo* v. *United States*, 319 U.S. 441, 445-447 (1943). "Particular deference should be accorded" to that rule when "the rights and privileges of the Federal Government at stake not only find their origin in the Constitution, but are to be divested in favor of and subjected to regulation by a subordinate sovereign." *Train*, 426 U.S. at 179.

as including substantive standards and the means for implementing those standards, but excluding punitive measures." *Mitzelfelt v. Department of Air Force*, 903 F.2d 1293, 1295 (CA10 1990).

Id. at 1639-1640. Similarly, in *Nordic Village*, the Court rejected a claim that Congress had waived federal immunity from monetary liability in Section 106(c) of the Bankruptcy Code. The Court found that Section 106(c) could be "plausibl[y]" construed not to reach monetary liability, which "is enough to establish that a reading imposing monetary liability on the Government is not 'unambiguous' and therefore should not be adopted." *Nordic Village*, 112 S. Ct. at 1016.[6]

The Idaho Supreme Court's determination that "the McCarran Amendment waives sovereign immunity and subjects the United States to the laws of Idaho in the Snake River Basin Adjudication including the payment of filing fees," App., *infra*, 20a, can be reconciled with neither this Court's rulings nor the language of the McCarran Amendment. When the McCarran Amendment was enacted, the United States generally was immune from any method of cost-shifting in litigation, whether by a judgment for costs or by otherwise requiring litigants to pay ex-

[6] See also, *e.g.*, *Library of Congress*, 478 U.S. at 318-321 (federal statute subjecting United States to "costs the same as a private person" including "a reasonable attorney's fee as part of the costs" did not subject United States to payment of interest on attorneys' fees); *Missouri Pac. R.R.* v. *Ault*, 256 U.S. 554, 563 (1921) (federal statute subjecting carriers under federal control to "all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law," did not subject federal carrier to penalties authorized by state statute).

penses, attorney's fees, or interest.[7] The McCarran Amendment, which does not even waive the United States' immunity to monetary claims on the merits, does not waive that longstanding immunity to monetary assessments. In particular, it contains no language authorizing the States to impose fees against the United States for "financing the costs [to the State] of adjudicating water rights." Idaho Code § 42-1414 (1990). Indeed, the McCarran Amendment's costs proviso makes clear Congress's intent that the United States would *not* be subject to state cost-shifting arrangements.

The Idaho Supreme Court made several distinct errors in nonetheless concluding that the McCarran Amendment waives federal sovereign immunity from assessment of the State's fees in litigation. First, the majority mistakenly determined that a clear and unambiguous waiver could be found in the Amendment's first sentence, which allows a State "to join the United States as a defendant in any suit" for the general adjudication of water rights. 43 U.S.C. 666(a). The Idaho court construed that language as a federal waiver of immunity to all state laws "necessary to carry out these types of suits." App., *infra*, 11a. Filing fee assessments are in no sense "necessary" to carry out a water rights adjudication. But more importantly, Congress's consent to joinder of

[7] See *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 20-21 (1926) (recognizing the United States' "sovereign prerogative not to pay costs"); accord *The Antelope*, 25 U.S. (12 Wheat.) 546, 550 (1827). See also, *e.g.*, *Library of Congress* v. *Shaw*, 478 U.S. at 314-317 (describing the United States' traditional immunity from interest assessments); *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685 (1983) ("Except to the extent it has waived its immunity, the Government is immune from claims for attorney's fees.").

the United States as a defendant cannot plausibly be read as consent to assessment of the unconventional filing fees Idaho has only recently begun to impose. Under traditional practice, it is the plaintiff initiating the action—rather than the defendant—who pays a nominal filing fee for invoking the jurisdiction of the court.[a] There is no reason to believe that Congress intended that joinder of the United States as a defendant in a water rights adjudication would enable States to make extraordinary multi-million dollar fee assessments against the federal treasury.[b]

The Idaho Supreme Court also erred in concluding that a clear waiver could be found in the first part of the McCarran Amendment's second sentence, which states that when the United States is properly joined, it shall "be deemed to have waived any right to plead that *the* State laws are inapplicable." 43 U.S.C. 666(a) (emphasis added). The Idaho court construed that phrase as a federal waiver of immunity to application of all state laws. App., *infra*, 11a-12a. Congress's placement of the definite article "the" before "State laws" indicates, however, that the waiver is limited to "the State laws" that Congress identified in the previous sentence: the state laws governing "acqui[sition of] water rights by appropriation." 43

[a] See, *e.g.*, 28 U.S.C. 1914 (requiring "the parties instituting any civil action * * * to pay a filing fee of $120"); see also 28 U.S.C. 1914 (1952) (requiring "the parties instituting any civil action * * * to pay a filing fee of $15).

[b] Significantly, when the United States is a plaintiff in the federal courts, it does not pay filing fees. See 28 U.S.C. 1913 note (United States not subject to filing fees in courts of appeals); 28 U.S.C. 1914 note (United States not subject to filing fees in district courts); 28 U.S.C. 1930 note (United States not subject to filing fees in bankruptcy proceedings).

U.S.C. 666(a). The provision makes clear that the United States cannot plead soveriegn immunity to excuse its failure to follow state law requirements in *acquiring water rights*, where the water rights are derived from state law rather than a federal reservation. In other words, the quoted phrase spells out the scope of the waiver of immunity insofar as the merits of the suit are concerned. It does not prevent the United States from asserting immunity from other "State laws," including statutes assessing attorney's fees and costs, for which a "separate waiver" is required. Cf. *Library of Congress* v. *Shaw*, 478 U.S. at 314. The Idaho court impermissibly enlarged the waiver, by implication, "beyond what the language requires." *Id.* at 318. See App., *infra*, 38a (Boyle, J., dissenting).

Finally, the Idaho Supreme Court misconstrued the second part of the second sentence of the McCarran Amendment, which states that the United States shall be subject to the "judgments, orders, and decrees of the court having jurisdiction" to the same extent as a private party, except that "no judgment for costs shall be entered against the United States in any such suit." 43 U.S.C. 666(a). The Idaho court concluded that this proviso does not prevent the State from imposing filing fees, because fees "are distinguishable from costs." App., *infra*, 14a. Although Idaho's filing fees differ from a judgment for costs in the *manner* by which the State exacts money from the federal treasury, those fees have the same purpose and effect of forcing the United States to fund the State's litigation costs, including fees to pay the State's attorneys and related expenses in connection with the suit. It makes no sense to conclude that Congress prohibited the States from subjecting the United States to a "judgment for costs," but none-

theless authorized the States to impose filing fees that serve the same purpose of "financing the *costs* of adjudicating water rights." Idaho Code § 42-1414 (1990) (emphasis added). Congress adopted the proviso to protect the United States from monetary liability—not to preclude a particular method of assessment.

In short, Idaho's assessment of filing fees against the United States cannot be reconciled with this Court's sovereign immunity decisions. Idaho's attempt to shift the costs of adjudication to the United States is impermissible because the McCarran Amendment does not allow it. As the Court recognized in *Library of Congress* v. *Shaw*, sovereign immunity may not be avoided "by devising a new name for an old institution." 478 U.S. at 321. That is exactly what Idaho seeks to do through its use of filing fees. Idaho has attempted to circumvent the McCarran Amendment's cost proviso by assessing costs at the beginning, rather than at the end, of the litigation.[10]

[10] The Idaho Supreme Court's statement that, prior to the McCarran Amendment, "at least six [States] did charge a fee for filing a notice of claim," App., *infra*, 13a, is inaccurate. Arizona, Nevada, and Oregon required payment of filing fees in administrative water rights proceedings, but they did not require payment of filing fees in judicial water rights proceedings. See Ariz. Code §§ 75-114, 75-137 (1939) (Idaho Exh. 243); Nev. Comp. Laws §§ 7905, 7914, 7930 (Bender-Moss 1929) (Idaho Exhs. 252-256); Or. Comp. Laws Ann. §§ 116-807, 116-822 (1940) (Idaho Exhs. 261-262). The difference is important because the McCarran Amendment waiver extends only to judicial water rights proceedings. See 43 U.S.C. 666(a) (allowing joinder of the United States "as a defendant in any suit" for the general adjudication of water rights). In the case of California, Colorado, and Washington, each of those States charged a nominal flat fee for filing a notice of claim. See 1943 Cal. Stat. 1641 (Cal. Water Code § 2850) ($5 per claim) (Idaho Exh. 245); Colo. Rev. Stat. § 147-9-19(4) (1953) ($5 per claim) (Idaho Exh. 246); Wash. Rev. Stat. § 7371 (Remington 1932) ($1 per claim). They did not charge anything like the extraordinary variable fees that Idaho seeks to assess in this case.

2. This case merits the Court's review, as the state court's decision presents a direct clash between the United States and an individual State concerning the scope of the federal government's sovereign immunity in state courts. The state supreme court has seriously misinterpreted Congress's intent in subjecting the United States to joinder as a defendant in state-initiated general stream adjudications, erroneously holding that a State may charge the United States monetary fees for the prerogative of defending its rights in state court. That question, which involves the intergovernmental relationship of the federal and state sovereigns, is a matter especially within this Court's province to decide. See *Arizona* v. *San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983); cf. *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

The issue is important not only as a matter of federal-state relations. It also has a direct impact on the administration of federal programs. The fees at issue are not nominal. In this adjudication alone, federal agencies must either pay fees assessments estimated to exceed $10 million or else forfeit their water rights. The Idaho court's decision will force federal agencies to redirect their limited funds to pay the State's costs in a state-initiated adjudication. As both dissenting Justices below recognized, that result conflicts with Congress's intent, expressed in the McCarran Amendment's costs proviso, that the United States not be subject to assessments for the

costs of adjudication. See App., *infra*, 28a-29a (Johnson, J., dissenting); *id.* at 39a (Boyle, J., dissenting).

The decision is additionally important because it subjects the United States to "potential fee exposure by all the states subject to the McCarran Amendment." App., *infra*, 40a (Boyle, J. dissenting). If the Court does not grant the petition for a writ of certiorari, other western States are likely to follow Idaho's course and enact legislation creating similar fee regimes that draw upon the federal fisc to finance state-initiated general stream adjudications.[11] The validity of Idaho's approach should be decided now, before other States expend time and energy to enact similar legislation and before the United States is forced to expend its limited litigation resources on challenges to such legislation in numerous state courts.

[11] The United States District Court for the District of Oregon subsequently followed the Idaho district court's decision in a case involving Oregon's imposition of filing fees in that State's administrative determination of water rights. *United States* v. *Oregon Water Resources Dep't*, 774 F. Supp. 1568, 1580-1581 (D. Or. 1991). The federal district court recently denied the United States' motion for reconsideration of that interlocutory ruling. See Order, No. 90-1329-FR (D. Or. July 10, 1992).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1992

APPENDIX A

1992 OPINION NO. 54

IN THE SUPREME COURT OF THE STATE OF IDAHO

BOISE, JANUARY 1992 TERM

S. Ct. No. 19407

IN RE THE GENERAL ADJUDICATION OF RIGHTS TO THE USE OF WATER FROM THE SNAKE RIVER BASIN WATER SYSTEM

STATE OF IDAHO, ex rel. R. KEITH HIGGINSON, in his official capacity as Director of the Idaho Department of Water Resources,
PLAINTIFF-RESPONDENT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

and

IDAHO POWER COMPANY,
TWIN FALLS CANAL COMPANY,
NORTH SIDE CANAL COMPANY,
DEFENDANTS-RESPONDENTS

Filed: March 30, 1992

FREDERICK C. LYON, Clerk

Appeal from the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls. The Honorable Daniel C. Hurlbutt, Jr., District Judge.

Appeal from the denial of a petition for writ of mandamus. *Affirmed.*

McDEVITT, J.

This cases arises out of the Snake River Basin Adjudication. The United States filed a Petition for a Writ of Mandamus, requesting the district court to issue an order requiring the director of the Idaho Department of Water Resources (the agency in charge of receiving notice of claims to water rights in the adjudication) to accept the filing of the United States' Notices of Claims to a Water Right without payment of the required filing fees. The district court denied the petition. We affirm.

The Snake River Basin Adjudication ("SRBA") is being conducted pursuant to I.C. § 42-1406A. On June 30, 1989, the United States of America filed a petition for a Writ of Mandamus, or alternatively, declaratory or injunctive relief. The United States sought an order from the district court requiring the director of the Idaho Department of Water Resources ("the director") to accept the filing of its claims without payment of the filing fees as required by I.C. § 42-1414. The United States contends that the McCarran Amendment, 43 U.S.C. § 666, does not waive sovereign immunity from the payment of filing fees.

Subsequent to the filing of the petition, on July 6, 1989, the United States submitted its Notices of Claim to a Water Right on behalf of the Bureau of Reclamation and the Department of the Interior without payment of the filing fees to the director. The

director refused to file the notices of claims. On July 10, 1989, the district court entered an order requiring the director to accept the notices for lodging, but not for filing.

The district court required the United States to submit a list of issues to be litigated concerning the issue of filing fees. Several motions for summary judgment were filed by the parties. The trial court issued two separate memorandum opinions. The first was filed December 27, 1990. The district court also granted the State's Motion for Summary Judgment as to several issues and then limited the issues to be considered at trial. The remaining issues were tried to the district court without a jury, after which, the district court denied the United States' petition for a Writ of Mandamus. From this denial the United States appeals.

ISSUE ON APPEAL

DOES THE McCARRAN AMENDMENT, 43 U.S.C. § 666, ALLOW THE STATE OF IDAHO TO COLLECT FILING FEES FROM THE UNITED STATES FOR CLAIMS FILED IN THE SNAKE RIVER BASIN ADJUDICATION?

A little background on the SRBA and on general water adjudications in the State of Idaho is helpful in understanding the dispute between the parties. In 1985, the Idaho Legislature passed I.C. § 42-1406A.[1]

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[1] Idaho Code § 42-1406A provides in part:

Snake River Basin Adjudication—Commencement.—(1) Effective management in the public interest of the waters of the Snake River basin requires that a comprehensive determination of the nature, extent and priority of the rights of all users of surface and ground water from that system be determined. Therefore, the director of the department of water resources shall petition the district

court to commence an adjudication within the terms of the McCarran amendment, 43 U.S.C. section 666, of the water rights of the Snake River basin either through initiation of a new proceeding or the enlargement of an ongoing adjudication proceeding. The petition shall describe:

(a) The boundaries of the system within the state to be adjudicated:

(b) Any class of water users within the system and the boundaries of any hydrologic sub-basins within the system for which the director intends to proceed separately with respect to the actions required or authorized to be taken pursuant to sections 42-1408 through 42-1414, Idaho Code; and

(c) The uses of water, if any, within the system that are recommended to be excluded from the adjudication proceeding.

(2) Upon issuance of an order by the district court which:

(a) Authorizes the director to commence an investigation and determination of the various water rights to be adjudicated within the system;

(b) Defines the boundaries of the system within the state to be adjudicated;

(c) Defines the classes of water users within the system and the boundaries of any hydrologic sub-basins within the system for which proceedings may advance separately pursuant to section 42-1408 through 42-1414, Idaho Code; and,

(d) Defines any uses of water excluded from the adjudication proceedings; the adjudication shall proceed in the manner provided under the provisions of chapter 14, title 42, Idaho Code, with the exception of sections 42-1406 and 42-1407, Idaho Code.

(3) In exercising his authority under subsection (1) of this section, the director of the department of water resources:

(a) Shall petition the district court to commence an adjudication of the water rights of all of the Snake River basin within the state of Idaho upstream from

This statute required the director to file a petition in district court to commence an adjudication of the water of the Snake River Basin. The director filed a petition seeking a court order commencing the adjudication in the district court on June 17, 1987. In this petition, the director named the United States and all other water users as defendants. The district court entered an order on October 14, 1987, commencing the Snake River Basin Adjudication. This Court then affirmed the district court's order commencing the adjudication. *In re Snake River Basin Water Sys.*, 115 Idaho 1, 764 P.2d 78 (1988), *cert. denied, Boise-Kuna Irri. Dist. v. United States*, 490 U.S. 1005, 109 S.Ct. 1639 (1989).

Once the district court entered the order commencing the adjudication, Idaho statutes provide the procedure to be followed in the adjudication. Idaho Code § 42-1406A(2) required the director to perform an investigation to determine the various water rights among the water users of the Snake River Basin. Idaho Code §§ 42-1408 and 42-1408A instruct the director to prepare a notice and to serve notice upon all claimants. Claimants are then required by I.C. § 42-1409 to file Notices of Claim to a Water Right with the director. Idaho Code § 42-1414 sets the filing fees to be paid at the time of filing the Notice of Claim to a Water Right. The director then must investigate each separate claim. After investigating all claims, I.C. § 42-1411 requires the director to prepare a report determining what rights have been acquired under state law and then to file this report with the district court. Idaho Code § 42-1412 allows any claimant to object to any portion of the director's re-

the point at which the Snake River leaves the state of Idaho and enters the state of Oregon in section 14, township 4 north, range 6 west, Boise Meridian . . .

port. The district court then proceeds to trial on any contested matters. *Id.* Those portions of the director's report that receive no objection are admitted as true. I.C. § 42-1412(9). The district court then enters the final decree determining the water rights of each claimant. I.C. § 42-1413.

The United States contends that the McCarran Amendment, 43 U.S.C. § 666, which waives the United States' immunity from suit in water adjudications, does not waive immunity from filing fees. On the other hand, the State of Idaho asserts that the plain language of the McCarran Amendment waives any obstruction to the payment of filing fees. The State of Idaho asserts that the issue of whether the McCarran Amendment waives immunity to filing fees has been previously adjudicated in *United States v. Oregon Water Resources Dep't*, 774 F.Supp. 1568 (D. Or. 1991); *In re the General Adjudication of all Rights to Use Water on the Big Horn River Sys.*, 753 P.2d 76 (Wyo. 1988), *affirmed by an equally divided court*, 492 U.S. 406, 109 S. Ct. 2994 (1989); and, *United States v. City & County of Denver*, 656 P.2d 1 (Colo. 1983). These cases fail to fully address the contentions of the United States, therefore, we deem it necessary to discuss at some length the issue on appeal.

Both the United States and the State of Idaho urge that this is a "simple" case of statutory construction.

It is a fundamental principle of jurisprudence that the United States is immune from suit unless it consents to be sued. *Kiefer & Kiefer v. Reconstruction Fin. Corp.*, 306 U.S. 381, 59 S. Ct. 516 (1939). This immunity extends to barring an individual state from suing the United States unless the federal government consents to such suit. *Minnesota v. United States*, 305 U.S. 382, 59 S. Ct. 292 (1939). Only the United States Congress can grant such consent to be sued. *United States v. Sherwood*, 312 U.S. 584, 61

S. Ct. 767 (1941); *Morrison v. Work*, 266 U.S. 481, 45 S. Ct. 149 (1925). Absent a waiver of sovereign immunity by Congress, the United States cannot be sued. *Loeffler v. Frank*, 486 U.S. 549, 108 S. Ct. 1965 (1988).[2] The waiver of immunity must be expressed in the statutory text in question and not from extraneous sources. *United States v. Nordic Village, Inc.*, 1992 Slip Op. 90-1629; *Dellmuth v. Muth*, 491 U.S. 223, 228-29, 109 S. Ct. 2397, — (1989); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 105 S. Ct. 3142 (1985).

Once a waiver of sovereign immunity is found to exist, "those conditions must be strictly observed, and exceptions are not to be lightly implied." *Block v. North Dakota*, 461 U.S. 273, 287, 103 S. Ct. 1811, 1820 (1983). The extent of the waiver is not to be extended beyond the "clear and unambiguous" language of the statute. *Hancock v. Train*, 426 U.S. 167, 179, 96 S. Ct. 2006, 2013 (1976). While being careful not to enlarge a waiver of soveign immunity beyond that which is expressed in the language that Congress used in the statute, a court should remember the "broad and just purpose which the statute was designed to effect" to help in determining the extent of the waiver. *Indian Towing v. United States*, 350 U.S. 61, 68, 76 S. Ct. 122, 126 (1955).

Library of Congress v. Shaw, 478 U.S. 310, 106 S. Ct. 2957 (1986), involved a lawsuit involving Title VII of the Civil Rights Act of 1964. The act authorized an award of back pay and reasonable attorney fees. The act also contained the language that "the United States shall be liable for costs the same

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[2] Following argument, the United States Supreme Court on February 25, 1992, decided another waiver of sovereign immunity case in *United States v. Nordic Village, Inc.*, 1992 Slip Op. 90-1629.

as a private person." 42 U.S.C. § 2000e-5(k). The plaintiff, Shaw, prevailed in the action and was awarded attorney fees. The trial judge increased the award by 30% to compensate the attorney for the delay in receiving payment for the services rendered. The Library of Congress appealed, alleging that the increase in compensation was disguised interest and was therefore, improperly awarded. The United States Supreme Court recognized the long-standing rule that the United States was immune from an interest award. In determining whether Congress had waived immunity from interest, the Court turned to two different phrases in the statute.

First, the Court looked at the phrase, "the same as a private person." The Court determined that this phrase had to be construed with the long-standing prohibition against an interest award. The Court determined that this was not an express waiver of immunity.

The Court also declined to find a waiver of immunity in the statutory requisite of awarding "reasonable" attorney fees. The Court held than an award of interest could not be read into the term "reasonable." Without the express use of language indicating a waiver of immunity from paying interest, there could be no interest award.

I.

Because of a need to adjudicate *all* rights to the use of a water system, it has been held that the McCarran Amendment authorizes the adjudication of the United States' water rights, including "appropriate rights, riparian rights, and reserved rights." [3] *United*

[3] "Reserved" rights are those rights reserved, either expressly or impliedly, by the United States and are exempt from appropriation. *Winters v. United States*, 207 U.S. 564, 28 S. Ct. 207 (1908). Generally, these rights consist of those rights reserved by treaty with the Indians. *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 103 S. Ct. 3201 (1983); *see also In re Rights to Use Water in Big Horn River*, 753 P.2d 76 (Wyo. 1988), *aff'd by an equally divided court*, 492 U.S. 406, 109 S. Ct. 2994 (1989); *State ex rel. Reynolds v. Lewis*, 88 N.M. 636, 545 P.2d 1014 (1976). But these rights also include those obtained by the U.S. prior to granting Statehood to a territory by the riparian doctrine or for the purpose of maintaining navigable stream flows, *United States v. Rio Grande Dam & Irri. Co.*, 174 U.S. 690, 19 S. Ct. 770 (1899); and other rights created by the U.S. when it held land as a territory. *United States v. Winans*, 198 U.S. 371, 25 S. Ct. 662 (1905).

States v. District Ct., County of Eagle, Colo., 401 U.S. 520, 524, 91 S. Ct. 998, 1002 (1971). An adjudication contemplates more than just determining those rights acquired by appropriation, but all rights, however acquired or reserved, to use water from a water system.

Being cognizant of these well-established principles, we turn to the act of Congress involved in this case. The pertinent statute is 43 U.S.C. § 666(a), which states:

> Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty,

> and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances. *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

The United States correctly asserts that the first sentence of the McCarran Amendment waives any objection by the United States that it is immune from joinder in water adjudications. The United States asserts that the language of the first sentence:

> where it appears that the *United States* is the owner of or is in the process of acquiring water rights *by appropriation under State law*, by purchase, by exchange, *or otherwise*, and the United States is a necessary party to such suit.

43 U.S.C. § 666(a) (emphasis added), must be read in conjunction with the second sentence. The second sentence reads in part:

> The United States, when a party to any such suit, shall (1) be deemed to have waived any right *to plead* that *the* State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, . . .

43 U.S.C. § 666(a) (emphasis added). The United States argues that the use of the term "plead" indicates that the provision applies to legal defenses and that "the State laws" of the second sentence refers back to the phrase "appropriation under State law" contained in the first sentence. Reading these two phrases together, the United States maintains that the provision simply bars the United States from claiming

that *the laws pertaining to appropriation under state law* are inapplicable, and that this language does not waive immunity from paying filing fees. The United States asserts that if Congress had intended to waive immunity to filing fees, it would be necessary for Congress to use the term "all" instead of the term "the."

This argument fails for several reasons. First, the term "any such suit" contained in the second sentence has to refer to the "defendant in any suit" language of the first sentence. The McCarran Amendment defines any suit as a "suit (1) for the adjudication of rights to the use water of a river system or other source, or (2) for the administration of such rights." Subjecting the United States to these types of suit would necessarily subject the United States to those state laws necessary to carry out these types of suits, as they entail more than just mere appropriation. Congress recognized a need to allow the States to control the adjudication. To hold otherwise would allow the United States to plead immunity from those procedural rules contained in the statute and any other rule or statute pertaining to a water adjudication or administration suit, but not directly pertaining to the appropriation of water, that the United States found inconvenient or objectionable. This would then allow the federal government to control the process of adjudication and not the individual states, which is contrary to the clear language of 43 U.S.C. § 666(a).

Second, the suggestion that Congress needed to use the word "all" to indicate a waiver of immunity from filing fees leads to an absurd result. The use of the term "all State laws" would subject the federal government to all state laws, not just those laws necessary for the adjudication or administration of water use. This would be a much broader waiver than necessary

or contemplated by the statute, and would also subject the United States to determination of issues other than water rights and runs afoul of the recent holding of the United States Supreme Court in *United States v. Nordic Village, Inc.*, 1992 Slip Op 90-1629.

Congress, in 43 U.S.C. § 666(a), when referring to "appropriation under state law, by purchase, by exchange, or otherwise," uses the word "law" in its singular form, but when referring to the "United States as a party to such suit" (an adjudication) uses the plural word "laws." This language selection clearly subjects the United States to all laws concerning an "adjudication," not just the law of appropriation. As previously stated, if the United States were only subject to the law of appropriation, and not the laws concerning a suit for adjudication or administration, the federal government would then be able to plead immunity and effectively control the adjudication. This is contrary to the clear language of the statute.

The United States Supreme Court in *Nordic Village*, found sections 106(a) and (b) of the Bankruptcy Code to *clearly express* a waiver of immunity by the United States as to "monetary liability." The language of 43 U.S.C. § 666(a), just as plainly as the Bankruptcy Code did in 106(a) and (b), express a "clear intent" of congress to subject the United States to all of the state court processes of an "adjudication" of its water rights with the sole exception of costs.

The employment of alternative statutory construction techniques is not required in analyzing 43 U.S.C. § 666(a) unless it is for the purpose of attempting to strain the plain statutory language to reach some preordained result.

No hypothetical, no alternate construction technique, can limit or alter the clear waiver of immunity of 43

U.S.C. § 666(a), nor cause "costs" to mean "filing fees."

II.

As another basis to support immunity from filing fees, the United States asserts that at the time the McCarran Amendment was passed, the western states allowed a judgment for costs at the end of litigation, but did not impose a filing fee. While it is true that each of the fourteen western states had some provision for shifting costs at the end of litigation, at least six did charge a fee for filing a notice of claim.[4] It is interesting to note the filing fee schedule of the state of Nevada, Senator McCarran's home state. Nevada had a variable filing fee schedule very similar to I.C. § 42-1414. Therefore, Congress could not have contemplated that no filing fees were being charged. Additionally, *Nordic Village* instructs us not to look to extraneous matters to find a clear waiver. To follow this path urged by the United States in this case would be error.

III.

Next, the United States argues that the filing fee imposed by the state is a disguised judgment for cost. There is a tendency to confuse the terms fees and costs; and although often used indiscriminately, the two terms are distinguishable. *Galpin v. City of Chicago*, 159 Ill. App. 135 (1910), *aff'd*, 249 Ill. 554, 94 N.E. 961 (1911). Each term has a peculiar and separate meaning in the law. *Parks v. Sutton*, 60 Utah 356, 208 P. 511 (1922). It has long been recognized that "costs" is a term of known legal significance and

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[4] Arizona, California, Colorado, Nevada, Oregon, and Washington.

differs from "fees." *Alexander v. Harrison*, 2 Ind. App. 47, 28 N.E. 119 (1891). "Costs" are a pecuniary allowance or a reimbursement made to the prevailing party in a lawsuit and are recoverable from the losing party. *Weiner v. Swales*, 217 Md. 123, 141 A.2d 749 (1958). Costs are sometimes referred to as incidental damages and are awarded to indemnify or reimburse a party for expenses incurred. *Hayman v. Morris*, 37 N.Y.S.2d 884 (1942); *People v. Goulding*, 275 Mich. 353, 266 N.W. 378 (1936). Costs are usually awarded upon a final determination of the litigation. *Foley v. Carter*, 214 App. Div. 292, 212 N.Y.S. 381 (1925).

"Fees" on the other hand, are distinguishable from costs. *Clay v. Overseas Carriers Corp.* 61 F.R.D. 325 (D. Penn. 1973). In its usual and ordinary context, a fee is a charge for a privilege or a service under the control of the government, *City of Kettering v. Berger*, 4 Ohio App. 3d 254, 448 N.E. 2d 458 (1982), such as a filing fee. *People v. Goulding*, 275 Mich. 353, 266 N.W. 378 (1936). Fees do not come within the term costs. *In re Terry*, 67 Misc. 514, 123 N.Y.S. 258 (1911). While costs are the charges that a party may recover from the opponent, fees are those amounts paid to the court. *Copper Liquor v. Adolph Coors Co.*, 684 F.2d 1087 (5th Cir. 1982). Stated simply, fees are compensation paid to an officer, such as the court, for services rendered to individuals in the course of litigation. *Bradley v. State*, 69 Ala. 318 (1881); *Tillman v. Wood*, 58 Ala. 578 (1877).

An interesting case that illustrates the difference between a fee and costs is *Bohart v. Anderson*, 24 Okla. 82, 103 P. 742 (1909). In *Bohart*, counsel for plaintiff wished to file a petition without paying the

required filing fee. Instead, plaintiff's counsel wished to post a bond for costs in case his petition was unsuccessful. In denying counsel's request, the Oklahoma Supreme Court stated that there is a well recognized difference between costs and fees. While costs are an allowance to the prevailing party, fees are an expense payable to the court in advance. The court held that without payment of the filing fees, the clerk of the court could lawfully withhold his or her services until the fee was paid.

We decline to read the term judgment for costs as including the term filing fees. Each term has a plain and ordinary meaning in the law, and each term had been in use in and applied in its plain meaning in the western states when Congress passed the McCarran Amendment.

The United States places emphasis on the fact that the Department of Water Resources is the party initiating the instant suit and the United States is a defendant. Thus, the United States asserts that the expenses incurred by the Department of Water Resources in performing the adjudication are actually "costs" incurred by a party litigant. This argument misses the mark. A general water adjudication brought by the state is analogous to an interpleader action. *United States v. Bluewater-Toltec Irri. Dist.* 580 F. Supp. 1434 (D.N.M. 1984), *aff'd sub nom., United States on behalf of Acoma & Laguna Indian Pueblos v. Bluewater-Toltec Irr. Dist.*, 806 F.2d 986 (10th Cir. 1986). The position of the director of the Department of Water Resources is analogous to the "stakeholder" in an interpleader action. The director is really a disinterested party. The only interest the director has is to see that all rights are accurately

adjudicated. The director does not oppose a claim, trying to subvert a valid claim. Nor does the director stand to gain if a claim is invalidated. "The United States has entered the suit asking that its rights be determined." *New Mexico v. Molybdenum Corp. of Am.*, 570 F.2d 1364, 1366 (10th Cir. 1978). Thus, the United States is "a water applicant" or claimant seeking affirmative relief from the state and not a "defendant." *United States v. Bell*, 724 P.2d 631, 647 (Colo. 1986) (Erickson, J., specially concurring). We determine this argument to be without merit.

IV.

The final argument that the United States makes concerns an asserted conflict within the Idaho Code. The United States asserts that I.C. § 42-1408A(1)(j), which deals with the contents of the notice of order commencing the general adjudication, exempts the federal government from paying filing fees. Idaho Code § 42-1408A(1)(j) states:

> [S]ection 42-1414, Idaho Code, requires each claimant, other than those exempted by federal law, to pay a variable fee with a notice of claim; failure to pay the fee will result in rejection of the notice of claim; failure to file a timely notice of claim will result in the assessment of a late fee in the amount of fifty dollars ($50.00) or fifteen per cent (15%) of the original filing fee, whichever is greater.

It is asserted that this language conflicts with I.C. § 42-1414 which states:

> [T]he department of water resources shall accept no notice of claim required under the provi-

> sions of section 42-1409, Idaho Code, unless such notice of claim is submitted with a filing fee based upon the fee schedule set forth below. Failure to pay the variable water use fee in accordance with the timetable provided shall be cause for the department to reject and return the notice of claim to the claimant.

The United States urges that § 42-1408 recognizes that the federal government is exempt from filing fees. In support of this argument, the United States points to portions of the Idaho State Legislative Advisory Committee report regarding the filing fees. In the committee report, an economist commented that the federal government could be exempt from paying filing fees. We find no merit in the federal government's contention. The plain langauge of I.C. § 42-1414 imposes a filing fee upon all claimants, there is no exception for the United States to be exempted from its provisions. Idaho Code § 42-1408A(1)(j) does not affect the obligation imposed by I.C. § 42-1414 of paying filing fees upon the filing of a "Notice of Claim to a Water Right."

V.

For historical purposes only and not as a basis for construing 43 U.S.C. 666(a), we note the following. Congress, in passing 43 U.S.C. 666(a), recognized that:

> In the arid Western States, for more than 80 years, the law has been that the water above and beneath the surface of the ground belongs to the public, and the right to use thereof is to be acquired from the State in which it is found, which State is vested with the primary control thereof.

> In 1877 the Congress, in the Desert Land Act of 1877 (19 Stat. L. 377, Ch. 107), severed the water from the land, and the effect of such statute was thereafter that the land should be patented by the United States separate and apart from the water and that all the nonnavigable water should be reserved for the use of the public under the laws of the States and Territories named in the act . . .

S. Rep. No. 755, 82d Cong., 1st Sess., 3 (1951).

Thus, the Desert Land Act of 1877[5], recognizes the right of the western states[6] to legislate the appropriation of the waters within its borders. *California Oregon Power Co. v. Beaver Portland C. Co.*, 295 U.S. 142, 55 S. Ct. 725 (1935). While the basics of the doctrine of prior appropriation is the same from state to state, the doctrine has evolved to meet the specific needs of each state and thus differs among the western states. *The Doctrine of Prior Appropriation and the Changing West* (Report of the Western States Water Council, 1987). Congress understood this fact and that is why the laws concerning appropriation were left up to each individual state.

It is also clear that Congress envisioned the anarchy that would ensue in the United States were immune from suit in adjudication cases. Congress realized:

> It is most clear that where water rights have been adjudicated by a court and its final decree

[5] 43 U.S.C. § 321 *et seq.*

[6] California, Colorado, Oregon, Nevada, Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico, and North and South Dakota. 43 U.S.C. § 323.

> entered, or where such rights are in the course of adjudication by a court, the court adjudicating or having adjudicated such rights is the court possessing the jurisdiction to enter its orders and decrees with respect thereto and thereafter to enforce the same by appropriate proceedings. In the administration of and the adjudication of water rights under State laws the State courts are vested with the jurisdiction necessary for the proper and efficient disposition thereof, and by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights. Accordingly all water users on a stream, in practically every case, are interested and necessary parties to any court proceedings. It is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its departments is permitted to claim immunity from suit in, or orders of, a State court, such claims could materially interfere with the lawful and equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of the State Courts. . . . The bill (S. 18) was introduced for the very purpose of correcting this situation and the evils growing out of such immunity.
>
> The committee believes that such a situation cannot help but result in a chaotic condition.

S. Rep. No. 755, 82d Cong., 1st Sess. 4-5 (1951). As Congress realized, under the law of prior appropriation, all water users are interrelated. The amount of water one user consumes affects the

amount of water available for other water users. If the United States had remained immune, a water adjudication would serve no useful purpose. If the state was unable to include the United States, there would be no way to determine the rights of private users.

CONCLUSION

We hold that the McCarran Amendment waives soverign immunity and subjects the United States to the laws of Idaho in the Snake River Basin Adjudication including the payment of filing fees. Therefore, we affirm the ruling of the district court denying the petition of the United States.

No costs on appeal.

BAKES, C.J. and BISTLINE, J., concur.

BISTLINE, J. concurring in the opinion of McDevitt, J:

I.

In this past week this Court has received from the Supreme Court of the United States its recent opinions in *United States v. Nordic Village, Inc.*, S. Ct. No. 90-1629 (1992). That opinion appears to be pertinent to the above entitled case which this Court has had under consideration since we heard oral argument in January 1992. As is readily observed, Justice McDevitt has expressed his views in writing what may become the majority opinion. Justice Johnson has favored the members of the Court with his differing views as has Justice Boyle. A reasonable inquiry is to ascertain what effect, if any, *Nordic Village has* on the controversy still before us.

Initially it is to be noted that this Court's opinions in *In Re Snake River Basin Water System*, 115 Idaho

1, 764 P.2d 78 (1988), show that Justice Johnson wrote the opinion for the Court. Although three justices joined that opinion, I wrote a sole dissenting opinion at 115 Idaho 10-11, 764 P.2d 88-89. The views which I expressed were mine and mine alone. Now, when the majority of four justices appears to be presently not all of the same mind in regard to the sequel *Snake River Basin* controversy now before us, and with *Nordic Village* now at hand, it is in order that my views be expressed for what they may be worth.

Rather than recapitulate or synopsize, perhaps it is better that my short opinion written in 1988 be displayed for the benefit of interested readers. In doing so, those paragraphs which to my mind are the more applicable are emphasized:

> The claim of the irrigation districts and the water districts, and the user memebrs thereof, as I understand the claim to be, is not that they assert any new water rights, but simply challenge the right of the state of Idaho in the person of its legislature to cause to be relitigated that which has been litigated, or to readjudicate that which has been adjudicated and gone to a final judgment.
>
> It has been held that a water right is a property rights. An adjudicated water right is a highly perfected water right. It is the decree or judgment of a state district court, and once wholly final is subject to no attack other than that it was fraudulently obtained. The McCarran Report, partially reprinted in the majority opinion, at 7-8, 764 P.2d at 84-85, acknowledges that 'the State courts are vested with the jurisdiction necessary and proper . . . for the admin-

istration of and adjudication of water rights under state laws.' This has always been my understanding. I agree with the Report in the statement that *in practically every case all water users on a stream are interested parties to any court proceeding.* I am not persuaded that all such water users *are necessary parties* in all cases, in the sense that the action cannot proceed without a state court (here, Idaho) gaining jurisdiction over them. A water user having a valid state judicial decree in his pocket, meaning one that flows from a valid court decree, will be interested, of course, but not necessarily a necessary party. Else, why, one might ask, what has he gained by having once successfully litigated, if into litigation once again he will be forced?

The pertinent portion of the McCarran Report, at 7, 764 P.2d at 84, as I comprehend its language, is that it has in mind only those water users claiming a water right by reason of the ownership of the United States or any of its departments who seek to don the cloak of immunity which does shield the United States of America. The McCarran Act itself shreds that assumed cloak.

I take no umbrage with the final paragraph of the Report which is reprinted in the majority opinion, at 7, 764 P.2d at 84, *i.e.*, 'that it is essential that each and every owner *along a given water course*, including the United States, must be amenable to the law of the State, . . .' My understanding is that prior litigation on the tributaries of the Snake River afforded all owners on those rivers or streams the opportunity to be involved. If the opportunity to litigate was pres-

ent but eschewed, the litigation is nevertheless as final as to those who did not choose to participate as to those who did so. Such an action was basically *in rem.*

The McCarran Act undoubtedly is, as Justice Johnson has written, a Congressional waiver of otherwise unassailable federal immunity as to actions for stream adjudications brought in Idaho courts. The so-called 'special appearance' of the United States District Attorney for Idaho is in my view of no consequence. The law heretofore has been that the United States can only be sued by its consent, and if district attorneys are freely empowered to give or withhold that consent, I am woefully ignorant of that change. As for my part, until I become better informed, the United States of America, and each and all of its departments, agencies, bureaus, and whatever, are in court because of the McCarran Act, or, conversely, are not in court because of that Act's inapplicability, which I much doubt, and on which issue I agree with Justice Johnson's opinion.

But, accepting that the United States may be subject to jurisdiction of an Idaho state district court, I am left wondering how that conclusion necessitates a holding that water right users possessing valid judgments or decrees and, probably valid water rights of any degree, can be brought into this action against their will.

As mentioned above, it can be said confidently without citation that an adjudicated water right is a property right. Like any other property, it can be forfeited or abandoned, but there is no such claim here. Like any other property, it can

be taken by such authorities as have the power of eminent domain, but a just compensation must be paid therefore.

Although feeling not obliged to search for authority in that vein, a study of Justice Johnson's opinion reassures me when I read on page 14 of the slip opinion his ten line excerpt from *California v. Rank*, 293 F.2d 340, in which litigation the state of California was positioned as is Idaho in this litigation, *i.e.*, the defendant. The plaintiffs in that action were owners of the beneficial use of the river of the San Joaquin River below the dam. The United States over its protest was joined as a necessary party defendant.

What I make out of reading that case as it definitely has application to the case at hand, is that '. . . the United States has the power to acquire the rights of these plaintiffs through exercise of eminent domain.' Rank, *293 F.2d at 354. And, '[w]hile a state can bestow property rights on its citizens which the United States must respect, it cannot take from the United States the power to acquire those rights.' Id. at 354. Presently, the United States of America is not attempting to seize or otherwise appropriate any property rights. In fact, all that we see is the claim of the United States District Attorney, Idaho, that the United States is not in court.*

I am unable to see the grounds upon which the state of Idaho can force the owners of valid water rights to litigate that which is res judicata. *Nor do I understand how the legislature can purport to authorize such. The legislature is prohibited by two constitutions from impairing the obligation of contract, and in my humble view,*

an adjudicated water right, especially one with whiskers, is on an even higher plane than a contract.

Until better informed, I must respectfully dissent, and am deeply concerned with the plight which the state of Idaho has brought down on the innocent owners of water rights in Idaho. Those water rights are not free-hanging merchandise like tires and beer, but are appurtenant to lands which lands for the most part would be greatly devalued without water rights. To make such owners parties to this litigation is tantamount to an impermissible restraint on the right of free alienability of land.

In Re Snake River Basin Water System, 115 Idaho at 10-11, 764 P.2d at 88-89 (emphasis in original and added).

II.

With the foregoing background out of the way, turning first to Justice McDevitt's opinion, correctly noted therein is the genesis of this on-going litigation, *i.e.*, the 1985 legislature's enactment of I.C. § 42-1406A, most provisions of which the reader will find displayed in footnote 2 of Justice McDevitt's opinion.[7] Justice McDevitt, following his review of

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[7] Omitted therefrom immediately following I.C. § 42-1406A(1) and (2), is (3)(b) which mandates that the director "[m]ay petition the district court to commence an adjudication of the water rights of the main stem of the Snake River which forms the boundary between the state of Idaho and the states of Oregon and Washington. The director may include within his petition under this paragraph any unadjudicated tributaries. The director shall not include in the petition filed under this paragraph any adjudicated tributary unless

applicable law, reaches the conclusion that the United States is required to pay a filing fee to the clerk of the district court. In other words, immunity from paying fees has been waived. Presently I am not persuaded of any error in his analysis.

III.

Finally, turning to the *Nordic Village* opinions which we recently received, once again I find that those two highly esteemed jurists on the United States Supreme Court, Justice Stevens and Justice Blackmun, have provided the necessary guidance. First, their dissent nicely brings attention to what the majority has done in the area of sovereign immunity:

> An officer of an insolvent corporation appropriated corporate funds and used them to discharge a personal tax obligation. Because the Federal Government was the ultimate recipient of the stolen property, the Court holds that the bankruptcy trustee cannot avoid the transfer. The interest in a rigid interpretation of the doctrine of sovereign immunity outweighs the interest in equitable treatment of general creditors and shareholders of the corporate debtor. This result is neither necessary nor just.

Nordic Village, S. Ct. No. 90-1629, slip op. at 1 (Stevens, J. dissenting). Their assessment that the Court, speaking through the opinion of Justice Scalia, condones an injustice is readily accepted, as is also

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the United States, or other parties who[se] consent is necessary, refuse to consent to the jurisdiction of the district court to adjudicate all federal or Indian water rights claims pursuant to the McCarran amendment, 43 U.S.C. section 666."

true of the statement that the Court's interest in a rigid interpretation of the doctrine of sovereign immunity does not outweigh the equitable treatment of general creditors and shareholders of the corporate debtor. The Court evades this conclusion by hypothesizing "plausible" alternatives of the statute, by refusing to consider its legislative history, and by reiterating the Court's view that waivers of immunity must be strictly construed.

The entire content of the opinion with its veritable footnote history of criticisms of the doctrine of sovereign immunity are well worth the reading. The views of Justices Stevens and Blackmun are well-stated and convincing. Presently, although the controversy laid before us comes in the context of a huge adjudication of water rights, and is not a bankruptcy outgrowth, my regard for the views of Justices Stevens and Blackmun, guide me to agree with Justice McDevitt, who has appropriately reached the correct conclusion.

QUAERE: Is this action, which arose in state district court and is now pending in this Court, such a suit as is contemplated in § 666, 43 U.S.C., *California v. Rank*, 293 F.2d 340, (9th Cir. 1961)? [8]

ANSWER: It so appears to be, Accordingly I concur in Justice McDevitt's opinion.

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[8] Action there was initiated in state district court, and on defendants' motion removed to the United States District Court under the provisions of 2 U.S.C. 1441(a), *Rank v. Krug*, 90 F. Supp. 773 (D.C. 1950).

JOHNSON, J., dissenting.

I must respectfully dissent from the Court's opinion. In my view, by the McCarran Amendment the United States did not waive its sovereign immunity to the payment of "filing fees" in the SRBA.

Let us not becloud what the issue is here. The "filing fees" the state seeks to charge the United States are not the usual modest fees for filing pleadings in a lawsuit. The "filing fees" at issue here exceed TEN MILLION DOLLARS! Of this amount, eight and one-half million dollars represent "filing fees" for the adjudication of "reserved" rights, which are described in footnote 3 of the Court's opinion.

Although the United States has not premised its appeal on the applicability of the filing fee requirement to these reserved rights, the "Adjudication Rules and Regulations" of the Department of Water Resources require payment of filing fees only by "[a]ll persons filing claims to water rights acquired under state law or amendments to claims to water rights acquired under state law." Reserved rights by their nature are not acquired under state law.

What is at issue here is requiring the United States to fund involuntarily a significant part of the cost of the SRBA, that was occasioned by the dilemma created by the decision of this Court in *Idaho Power Co. v. State of Idaho*, 104 Idaho 575, 661 P.2d 741 (1983). *In re Snake River Basin Water System*, 115 Idaho 1, 764 P.2d 78 (1988) gives a brief history of how the SRBA came into being. The long and short of it is that the Idaho Power Company and the State of Idaho set the SRBA in motion. The United States is just along for the ride, pursuant to the McCarran Amendment.

By this decision, the Court rules that the United States must pay these "filing fees" to help the Idaho Power Company and the State of Idaho carry out the SRBA. The Court's opinion says the "filing fees" are not "costs," which are prohibited by the McCarran Amendment. "Rose is a rose is a rose is a rose is a rose." Gertrude Stein, "Sacred Emily," *The Oxford Book of American Light Verse*, p. 293 (W. Harmon ed., Oxford University Press 1979).

By the McCarran Amendment, the United States consented to joinder as a defendant in a "general adjudication." *In re Snake River Basin Water System*, 115 Idaho at 6-9, 764 P.2d at 84-87. The plain reading of the McCarran Amendment indicates that the United States did not waive its sovereign immunity to the payment of costs. The Court's attempted distinction between "filing fees" and "costs" would be more persuasive if these were, in fact, filing fees. These "filing fees" are nothing more nor less than the State's costs for conducting the SRBA. By the McCarran Amendment, the United States waived its sovereign immunity only so far as being joined as a defendant, not so far as involuntarily paying the costs of the litigation.

BOYLE, Justice, dissenting.

I agree with the majority that "[a]bsent a waiver of sovereign immunity by Congress, the United States cannot be sued," *ante* at 5, (citing *Loeffler v. Frank*, 486 U.S. 549, 108 S.Ct. 1965 (1988)), and that the conditions of a waiver "must be strictly observed, and exceptions are not to be lightly implied." *Ante* at 5 (quoting *Block v. North Dakota*, 461 U.S. 273, 287, 103 S.Ct. 1811, 1820 (1983)). I also agree with the majority that the extent of any waiver must be artic-

ulated in the "clear and unambiguous" language of the statute. *See ante* at 5-6 (citing *Hancock v. Train*, 426 U.S. 167, 179, 96 S.Ct. 2006, 2013 (1976)). However, in my view, the majority does not correctly apply the United States Supreme Court's test for determining whether the statutory waiver of sovereign immunity in the instant case is "clear and unambiguous." As a result, the majority reaches a conclusion which is at odds with the Supreme Court's recent pronouncements. Accordingly, I respectfully dissent.

In *United States v. Nordic Village, Inc.*, slip op., 90-1629 (1992), the most recent pronouncement on the issue of statutory waivers of sovereign immunity, the Supreme Court clarified that its "clear statement" rule has two components. A statutory waiver must be grounded exclusively upon the statutory text (the textual requirement) and the waiver must be "unequivocal" (the unequivocal requirement). *See id.* at 7 (citing *Hoffman v. Connecticut Dept. of Income Maintenance*, 492 U.S. 96, 109 S.Ct. 2818 (1989) (Eleventh Amendment case) and *Dellmuth v. Muth*, 491 U.S. 223, 109 S.Ct. 2397 (1989) (Eleventh Amendment case)). These two requirements have been developed from an impressive number of recent opinions in both the context of statutory waivers of federal government immunity, *see, e.g., Ardestani v. INS*, 502 U.S. ——, 112 S.Ct. 515 (1991); *Library of Congress v. Shaw*, 478 U.S. 310, 106 S.Ct. 2957 (1986); *United States v. Mitchell*, 445 U.S. 535, 100 S. Ct. 1349 (1980), and in the context of state sovereign immunity protected by the Eleventh Amendment, *see, e.g., Blatchford v. Native Village of Noatak*, 501 U.S. ——, 111 S. Ct. 2578 (1991); *Hokman v. Connecticut Dep't of Income Maintenance*,

492 U.S. 96, 109 S.Ct. 2818 (1989); *Dellmuth v. Muth*, 491 U.S. 223, 109 S.Ct. 2397 (1989); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S.Ct. 2273 (1989), as well as in other contexts, *see, e.g., Gregory v. Ashcroft*, —— U.S. ——, 111 S. Ct. 2395 (1991); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 109 S. Ct. 2304 (1989). Although I candidly admire the skillful attempt by the majority opinion to make *Nordic Village* appear to support its position, it simply does not.

The textual requirement simply means that all evidence of a purported waiver of sovereign immunity must be found exclusively within the statutory text. The Court in *Nordic Village* defined this requirement from its cases in the Eleventh Amendment context. The Court stated,

> Contrary to respondent's suggestion, *legislative history has no bearing on the ambiguity* [*of a statute*]. As in the Eleventh Amendment context, *see Hoffman*, 492 U.S., at 104, the "unequivocal expression" of elimination of sovereign immunity that *we insist upon is an expression in statutory text.* If clarity does not exist there, *it cannot be supplied by a committee report. Cf. Dellmuth v. Muth*, 491 U.S. 223, 228-229 (1989).

Nordic Village, Slip op., at 7 (emphasis added). The Court's reference to *Dellmuth* in the above quote is instructive. In the context of the Eleventh Amendment, the Court stated that nontextual arguments were "beside the point." *Dellmuth*, 491 U.S. at 230, 109 S.Ct. at 2401. As emphasis, the Court went on:

> Our opinion in *Atascadero* should have left no doubt that we will conclude Congress intended

to abrogate sovereign immunity *only* if its intention is "*unmistakably clear in the language of the statute.*" [*Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242, 105 S.Ct. 3142, 3147 (1985)]. Lest *Atascadero* be thought to contain any ambiguity, we reaffirm today that in this area of the law, *evidence of congressional intent must be both unequivocal and textual.* Respondent's evidence is neither. In particular, we reject the approach of the Court of Appeals, according to which, "[w]hile the text of the federal legislation must bear evidence of such an intention, the legislative history may still be used as a resource in determining whether Congress' intention to lift the bar has been made sufficiently manifest." [*Pennsylvania v. Union Gas Co.*,] 839 P.2d at 128. Legislative history generally will be irrelevant to a judicial inquiry into whether Congress intended to abrogate the Eleventh Agreement. If Congress' intention is "unmistakably clear in the language of the statute," recourse to legislative history will be unnecessary; if Congress' intention is not unmistakably clear, recourse to legislative history will be futile, because by definition the rule of *Atascadero* will not be met.

Dellmuth v. Muth, 491 U.S. at 230, 109 S.Ct. at 2401 (emphasis added). The rule pronounced in *Atascadero* is the same rule at issue in this instant case, namely, that a waiver of sovereign immunity will only be found by a "clear and unambiguous" statement in the language of the statute. *See majority opinion ante* at 5-6. Accordingly, to meet the textual requirement for a waiver under the United States Supreme Court's clear statement test, the legislative

history of a statute, *see Nordic Village*, slip op., at 7, the purpose of a statute, *see Ardestani*, 502 U.S. at ——, 112 S. Ct. at 521, and even equitable considerations, *see id.*, are all irrelevant.

Notwithstanding the emphatic admonition by the United States Supreme Court to ignore non-textual evidence, the majority opinion in this instant case concludes that "costs" do not equal "fees" by an appeal to all non-textual sources. The text of the McCarran Amendment nowhere states that the term "fees" is excluded from the definition of "costs." To reach its conclusion the majority primarily relies on cases from other jurisdictions. *See ante* at 10-11. These cases do not purport to construe the term "costs" as it is used in 43 U.S.C. 666(a) and many of these opinions were decided long before the McCarran Amendment was enacted. *Id.* Where the Supreme Court has so clearly and emphatically limited the search for meaning to the text of the statute, the majority's attempt to use the definition of costs from other courts and in contexts outside the McCarran Amendment clearly runs afoul of the textual requirement articulated in *Nordic Village*.

In addition, notwithstanding the majority's historical background disclaimer, *see ante* at 12, the majority opinion in this instant case places subtle reliance on a Senate committee report accompanying the passage of McCarran Amendment. *See ante* at 12-14. As noted above, the United States Supreme Court specifically rejected committee reports as permissible considerations in determining the unequivocal words of a statute. *See Nordic Village*, slip op., at 7. Moreover, the majority's reference to a report of the Western States Water Council, *ante* at 13, and its references to the filing fees provisions of the

various western states at the time the McCarran Amendment was passed, *ante* at 10, are unacceptable considerations because they are not contained within the textual statutory provisions of the Amendment itself. While these considerations may be helpful in other contexts, the United States Supreme Court has emphatically stated that when interpreting whether Congress has eliminated sovereign immunity, the words contained within a statute are the only considerations that may be considered by a court. *Nordic Village*, slip op., at 7.

The underlying rationale supporting the exclusion of all nontextual evidence is that the words of the statute alone must provide unequivocal evidence that Congress intended to reject federal sovereign immunity. Paraphrasing what the Court stated in *Dellmuth*, if Congress' intention is "unequivocally expressed," *Nordic Village* slip op., at 3 (quoting *Irwin v. Department of Veterans Affairs*, 498 U.S. ——, —— (1990) (slip op., at 6)); *see also United States v. Mitchell*, 445 U.S. 535, 538 (1980); *United States v. King*, 395 U.S. 1, 4 (1969), in the words of a statute, then recourse to legislative history or other nontextual evidence of abrogation will be unnecessary; if Congress' intention is not "unequivocally expressed" in the statute itself, then recourse to nontextual materials will be futile, because by definition the clear statement test for waivers of sovereign immunity will not be met. *See Dellmuth*, 491 U.S. at 230, 109 S.Ct. at 2401. By considering nontextual material in the instant case the majority fails to adhere to the first requirement of the United States Supreme Court's test. More importantly, by so doing, the majority opinion fails to recognize that the second requirement of the test, the unequivocal textual

waiver requirement, is also not met by the text of the McCarran Amendment.

Under the unequivocal requirement, the United States Supreme Court has erected various rules of construction that weigh heavily against a statutory waiver. The Supreme Court's test does not merely attempt to give the words of the statute their best meaning. Instead the Court requires a search for an "unequivocal expression" in the language of the statute that leaves no doubt that the specific waiver in question "was affirmatively and separately contemplated by Congress." *Library of Congress v. Shaw*, 478 U.S. 310, 315, 106 S. Ct. 2957, 2962 (1986).

While the language of the statute is obviously the starting point for its analysis, *see Ardestani v. INS*, 502 U.S. ——, ——, 112 S.Ct. 515, 519 (1991), the United States Supreme Court has employed various construction techniques which limit a finding of waiver. In *Nordic Village*, the Supreme Court employed a technique which it borrowed from its Eleventh Amendment cases that may be called the "alternate-interpretation" rule. Under this rule, the existence of any reasonable statutory interpretation that does not entail a waiver of sovereign immunity is enough to illustrate that the statute is not an unequivocal expression of a federal waiver. This approach was employed in *Dellmuth v. Muth*, 491 U.S. at 231-32, 112 S. Ct. at 2402, and *Hoffman v. Connecticut*, 492 U.S. at 100-03, 109 S.Ct. at 2822-23, to ignore what were possibly the best interpretations of the statute, because other alternate interpretations existed.

In *Nordic Village* the Court used this approach when it entertained various alternate, hypothetical, constructions of the statute at issue. The Court did

not suggest that these interpretations were necessarily correct. Rather its point was that because these interpretations were merely plausible, they demonstrated that the statute did not unequivocally waive the federal government's sovereign immunity. The Court concluded this unique approach to statutory interpretation with these words: "[t]he foregoing are assuredly not the only readings of subsection (c), but they are plausible ones—which is enough to establish that a reading imposing monetary liability on the Government is not unambiguous and therefore should not be adopted." *Nordic Village*, slip op., at 7.

When there are doubts as to the unequivocal expressions of a statute the Supreme Court has resolved these doubts against a finding of waiver. The Court has noted that

> the traditional principle that the [Federal] Government's *consent* to be sued "*must be 'construed strictly in favor of the sovereign,' McMahon v. United States*, 342 U.S. 25, 27 (1951), and *not 'enlarge*[*d*] *. . . beyond what the language requires,*" *Ruckelhaus v. Sierra Club*, 463 U.S. 680, 685 (1983) (quoting *Eastern Transp. Co. v. United States*, 272 U.S. 675, 686 (1927)), [is] a rule of construction that we have had occasion to reaffirm once already this Term, see *Ardestani v. INS*, 502 U.S. ——, —— (1991) (slip op., at 7-8) (1991).

Nordic Village, slip op., at 4 (emphasis added.)

The Court's reference in *Nordic Village* to *Ardestani* is instructive because in that case the United States Supreme Court appeared to recognize that its clear statement test accompanied by its strict rules of construction yielded a result at odds with the

clearly defined purpose of the statute. Nevertheless, the Court rejected the petitioner's argument that the federal government had waived its immunity under the Equal Access to Justice Act (EAJA) for deportation proceedings. The Court stated:

> Finally, we consider Ardestani's argument that a functional interpretation of the EAJA is necessary in order to further the legislative goals underlying the statue. The clearly stated objective of the EAJA is to eliminate financial disincentives for those who would defend against unjustified governmental action and thereby to deter the unreasonable exercise of Government authority.
>
> We have no doubt that the broad purposes of the EAJA would be served by making the statute applicable to deportation proceedings. We are mindful that the complexity of immigration procedures, and the enormity of the interests at stake, make legal representation in deportation proceedings especially important. We acknowledge that Ardestani has been forced to shoulder the financial and emotional burdens of a deportation hearing in which the position of the INS was determined not to be substantialiy justified. But we cannot extend the EAJA to administrative deportation proceedings when the plain language of the statu[t]e, coupled with the strict construction of waivers of sovereign immunity, constrain us to do otherwise.

Ardestani, 502 U.S. ——, ——, 112 S.Ct. 515, 521 (1991).

The Supreme Court has frankly stated that "[t]he purpose of the rule is to permit the Government to

'occupy an apparently favored position.'" *Library of Congress v. Shaw*, 478 U.S. at 315-16, 106 S. Ct. at 2962 (quoting *United States v. Verdier*, 164 U.S. 213, 219, 175 S. Ct. 42, 44 (1896)). Based on these strict and well established rules of construction, the search for an affirmative declaration demonstrating a unequivocal expression of statutory waiver in the instant case is difficult indeed. It is clear that nowhere does the McCarran Amendment indicate or suggest that the federal government has waived its sovereign immunity for the purpose of assessing filing fees against it. Rather, the statute merely states that the United States will "be deemed to have waived any right to plead that [the] State laws are inapplicable" in a state water adjudication suit. The specific "State laws" referred to in 43 U.S.C. § 666(a) are nowhere mentioned. While the majority appears to conclude that the best interpretation of "State laws" is to find a waiver of sovereign immunity for all state laws involved in the water adjudication, including state laws requiring the payment of fees, this conclusion is not compatible with the two-part test required by the Supreme Court. The statute is capable of being construed as waiving sovereign immunity only to the extent of "State laws" which are necessary to the appropriation of water. Because the filing fee requirement is not necessary for determining who has a water right, this interpretation is at least "plausible." As a waiver of immunity is not to be "enlarge[d] . . . beyond what the language requires," *Nordic Village*, slip op., at 4; *Ruckelhaus v. Sierra Club*, 463 U.S. 680, 685 (1983) (quoting *Eastern Transp. Co. v. United States*, 272 U.S. 675, 686 (1927)), a construction of the statute limiting the federal government's waiver should be applied.

Moreover, the specific portion of 43 U.S.C. § 666 (a) limiting the federal government's waiver so "[t]hat no judgment of costs shall be entered against the United States" in water adjudication suits also leads to exactly the opposite inference as that drawn by the majority. While the majority labors valiantly to demonstrate the difference between costs and fees, it is also at least "plausible," to use the standard of *Nordic Village*, slip op., at 7, that the term "costs" was meant to include the filing fees at issue in this case. Even the majority acknowledges that "[t]here is a tendency to confuse the terms fees and costs." Ante at 10. As a plausible statutory interpretation, the explicit reservation of sovereign immunity for costs should be "construed strictly in favor of the sovereign." *Nordic Village*, slip op., at 4 (quoting *McMahon v. United States*, 342 U.S. 25, 27 (1951)).

The majority's holding rests in substantial part on its determination that Congress meant only to exclude "costs" but not "fees" from its waiver of sovereign immunity. While I appreciate the technical distinction attempted by the majority, a distinction which part III of the majority opinion reveals has never been made in Idaho until today, from the point of view of Congress a monetary charge by any name represents "costs" to the federal government. To expect Congress to have drawn a technical distinction between costs and fees when the majority recognizes that the two terms are "often used indiscriminately," *ante* at 10, is unrealistic in my view. Therefore, to construe the McCarran Amendment to merely forbid a waiver of "costs," and then allow a state to afterward enact laws imposing "fees," will only invite verbal manipulations by states aimed at avoiding federal sovereign immunity.

The majority recognizes that the textual and unequivocal requirements of *Nordic Village* present the proper analysis for this case. *See ante* at 5. Nevertheless, it refuses to follow the United States Supreme Court's analysis and holding because it will lead to a "preordained result." *See ante* at 9.

Under this Court's construction of the McCarran Amendment, the state now has no limit on the fees it can charge the federal government in this adjudication. The federal government cannot avoid being joined in this adjudication because of the McCarran Amendment, and multiplying the potential fee exposure by all the states subject to the McCarran Amendment, it is readily apparent why the United States Supreme Court is so concerned about limiting statutory waivers in all cases solely to those areas that were obviously contemplated by Congress.

Notwithstanding these concerns, the majority indicates that if it held otherwise, the "United States would effectively control the adjudication." *Ante* at 9. While apparently forgetting whose laws control and which sovereign is waiving its immunity, the majority allows the state to control not only the adjudication, but also how much the United States must pay for the privilege of adjudicating what state law cannot take away without its express consent. While my heart is with the majority, a reading of the McCarran Amendment and the United States Supreme Court cases addressing the sovereign immunity waiver issue will not lead to that result.

Because it is clear under the United States Supreme Court's cases that the McCarran Amendment does not provide an unequivocal statutory waiver of sovereign immunity for filing fees, I respectfully dissent.

APPENDIX B

[R. 1068-1071]

IN THE DISTRICT COURT
OF THE FIFTH JUDICIAL DISTRICT
IN THE STATE OF IDAHO
IN AND FOR THE COUNTY OF TWIN FALLS

Case No. 39576

IN RE THE GENERAL ADJUDICATION OF RIGHTS TO THE USE OF WATER FROM THE SNAKE RIVER DRAINAGE BASIN WATER SYSTEM

THE STATE OF IDAHO, EX REL. R. KEITH HIGGINSON in his official capacity as director of the Idaho Department of Water Resources, PETITIONER

vs.

UNITED STATES; STATE OF IDAHO; and all unknown claimants to the use of water from the Snake River Drainage Basin Water System, RESPONDENTS

JUDGMENT AND ORDER DENYING PETITION
FOR WRIT OF MANDAMUS OR,
ALTERATIVELY, FOR DECLARATORY AND
INJUNCTIVE RELIEF AND MOTION
FOR AN ACCOUNTING

DESCRIPTIVE SUMMARY

The United States filed a Petition for Writ of Mandate or in the Alternative for Injunctive Relief and Declaratory Relief, Document No. 89-06-008, on June 30, 1989. Some issues were resolved by summary judgment. Issue Nos. 3 and 4 came on regularly for trial before the court sitting without a jury on January 31, 1991. In addition, the United States filed a Motion for Judgment after Trial and for an Accounting, Document No. 91-02-09. This Judgment and Order finally resolves all issues raised by the Document Nos. 89-06-008 and 91-02-09. By this Judgment and Order, that petition, Document No. 89-06-008, and motion, Document No. 91-02-09, are denied.

JUDGMENT AND ORDER

On June 30, 1989, the United States filed a Petition for Writ of Mandamus or, Alternatively, for Declaratory and Injunctive Relief, together with a supporting memorandum, affidavits and exhibits. The State of Idaho filed a Memorandum in Opposition, together with an appendix of affidavits and exhibits, on October 30, 1989, to which the United States filed its Consolidated Reply Memorandum on December 12, 1989, with additional exhibits and affidavits. Idaho Power Company, et al. also filed a brief in support of the State. Argument was heard on December 18, 1989, on issues of law raised by that Petition.

On December 20, 1989, the Court entered an order directing all parties to "file any and all challenges to filing fees required by State Statute in this general stream adjudication," and an Order requiring the United States to file a statement of all issues and

challenges to the filing fees in this action. The United States timely filed such a statement, listed 20 issues or challenges to the filing fee requirement, and redesignated the issues argued on December 18, 1989 as Issue Nos. 1 and 2.

On January 16, 1990, the District Court, by Minute Order, denied the United States' Petition for Writ of Mandate on Issue Nos. 1 and 2 argued at the December 18, 1989 Status Conference. Subsequently, on April 17, 1990, the State of Idaho moved for Partial Summary Judgment on Issue Nos. 7, 8, 9, 10, 11, 12, 13, 14, 17 and 18 set forth in the United States' List of Issues. That motion was fully briefed and argued, and the Court entered its Memorandum Decision and Order on December 27, 1990, granting partial summary judgment to the State of Idaho on those ten issues. At a pretrial conference on January 14, 1991, the United States and State of Idaho requested the District Court to clarify its Memorandum Decision and Order Granting Summary Judgment entered on December 27, 1990. The District Court treated this request as a further motion for summary judgment by both parties and entered a Memorandum Decision on January 24, 1991 in favor of the State of Idaho on Issue Nos. 1 and 2.

Issue Nos. 3 and 4 were the subject of a trial, which took place on January 31 through February 6, 1991. At the conclusion of the trial the parties requested that the District Court allow post-trial briefing on the remaining issues. The United States stipulated that Issue Nos. 5 and 6 were subsumed in the ruling on Issue No. 1 and withdrew Issue Nos. 15, 19 and 20.

The United States submitted a post-trial brief on Issue Nos. 4 and 16 seeking judgment in its favor or, in the alternative, an accounting. The State and Idaho

Power Company also submitted post-trial briefs seeking judgment in their favor. On April 11, 1991, the Court entered its third Memorandum Decision ruling in favor of the State of Idaho on those issues which were heard at trial as well as on those issues which were the subject of post-trial briefing.

The Court has heard the testimony and reviewed the exhibits admitted into evidence, as well as the aforementioned memoranda, affidavits, and exhibits, submitted by the parties on the various issues raised by the United States, and has directed that judgment be entered in accordance therewith resolving all issues raised for determination by the United States' Petition for Writ of Mandamus or, Alternatively, for Declaratory and Injunctive Relief. Accordingly,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. The Petition for Writ of Mandamus or, Alternatively, for Declaratory and Injunctive Relief is hereby DENIED.
2. The United States' Motion for An Accounting is hereby DENIED as premature.
3. Each party shall bear its own costs.

DATED this 21 day of May, 1991.

DISTRICT COURT

/s/ Daniel C. Hurlbutt, Jr.
DANIEL C. HURLBUTT, JR.
District Judge

APPENDIX C

[R. 852-889]

IN THE DISTRICT COURT
OF THE FIFTH JUDICIAL DISTRICT
IN THE STATE OF IDAHO
IN AND FOR THE COUNTY OF TWIN FALLS

Case No. 39576

IN RE THE GENERAL ADJUDICATION OF RIGHTS TO THE USE OF WATER FROM THE SNAKE RIVER DRAINAGE BASIN WATER SYSTEM

THE STATE OF IDAHO, EX REL. R. KEITH HIGGINSON in his official capacity as director of the Idaho Department of Water Resources, PETITIONER

vs.

THE UNITED STATES; THE STATE OF IDAHO; and all claimants to the use of water from the Snake River Basin Water System, DEFENDANTS

MEMORANDUM DECISION ON THE STATE OF IDAHO'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON FILING FEES

State of Idaho Motion for Partial Summary Judgment on issues numbered 7, 8, 9, 10, 11, 12, 13, 14,

17 and 18 in the UNITED STATES LIST OF ISSUES REGARDING IDAHO'S "FILING FEES". *Granted.*

The State of Idaho seeks partial summary judgment on issues numbered 7, 8, 9, 10, 11, 12, 13, 14, 17 and 18 raised by the United States in its list of issues relating to the statutory requirement to pay filing fees in the Snake River Basin Adjudication. The United States alleges these issues as grounds supporting its Petition for Writ of Mandamus compelling the Director of the Idaho Department of Water Resources to accept all United States claims to water rights without the payment of filing fees set forth in I.C. § 42-1414.

The State's motion for partial summary judgment is reviewed under the well settled legal principles governing such motions. Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. In determining whether any issues of material fact exist, all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, must be construed in the light most favorable to the non-moving party, I.R.C.P. 56(c); *Sewell v. Nielson, Monroe, Inc.*, 109 Idaho 192, 706 P.2d 81 (Ct. App. 1985). Where a motion for summary judgment is supported by facts of record, the opposing party may not rest upon bare allegations or denials in its pleadings. *Verbillis v. Dependable Appliance Co.*, 107 Idaho 335, 337, 689 P.2d 227, 229 (Ct. App. 1984).

With these principles in mind each of the numbered issues will be discussed in turn.

I.

THE TAKINGS CLAUSE

Whether the "filing fee" enforcement mechanism of I.C. Code § 42-1415 (Supp. 1989) results in a taking of property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution as well as provisions of the Idaho Constitution, including Article 1, § 14.

(Issue No. 7, United States List of Issues at 6.)

The resolution of this issue rests upon a review of the statutory scheme enacted by the Idaho legislature implementing the filing fees provisions of the Snake River Basin Adjudication. I.C. § 42-1409(6) requires that, "[a]ll claimants of water rights that are included in a general adjudication shall file with the director a notice of claim. . . ." The director of the Department of Water Resources may not accept a notice of claim unless it is submitted with the statutory filing fee (I.C. § 42-1414). Further, the director, in executing his duties in an adjudication, may only conduct an examination of a water right for which a notice of claim has been filed (I.C. § 42-1410) and may not abstract or determine water rights to be included in the director's report unless a notice of claim has been filed (I.C. § 42-1411).

To enforce these notice of claim and filing fee requirements, the legislature provided that, ". . . failure to file a required notice of claim will result in a court determination that no water right exists for the use of water for which a required notice of claim was not filed. . . ." (I.C. § 42-1408A(1)(c)). Further, where the payment of a filing fee is to be paid in installments

under I.C. § 42-1414(3) and the claimant fails to meet a scheduled payment, the director ". . . may prohibit the diversion and use of water in satisfaction of a right claimed or decreed in the adjudication . . . ." (I.C. § 42-1415).

While the United States, as stated in Issue No. 7, only claims that I.C. § 42-1415 is constitutionally deficient, it argues in all its briefs that I.C. § 42-1414 may also violate the federal government's due process rights as an unconstitutional taking without compensation. Both statutes will be considered in this opinion.

The claim that the filing fee requirement in the Snake River Basin Adjudication is an unconstitutional taking without just compensation under the Fifth and Fourteenth Amendments of the United States Constitution must fail. It has been held many times that the due process protections of the Fifth Amendment, made applicable to the states under the Fourteenth Amendment, do not extend to the United States. *United States v. City of Jackson*, 318 F.2d 1, 8 (5th Cir. 1963); *Pennsylvania v. New Jersey*, 426 U.S. 660, 665, 96 S.Ct. 2333, 2336, 49 L.Ed.2d 124 (1976); *South Carolina v. Katzenbach*, 383 U.S. 301, 323-24, 86 S.Ct. 803, 816, 15 L.Ed.2d 769 (1965); *Economic Development and Industrial Corp. of Boston v. United States*, 11 Ct. Cl. 682, 688 (1987); *Economic Development and Industrial Corp. of Boston v. United States*, 546 F. Supp. 1204, 1214 (D. Mass. 1982). This is also the position the United States has adopted in similar litigation in the federal courts in which the government has affirmatively asserted that it is not a "person" protected by the Fifth and Fourteenth Amendments to the United States Constitution. *United States v. South Coast Air Qual-*

ity Management District, 748 F.Supp. 732 (D.C.C.D. Ca. 1950).

Therefore, as a matter of law, summary judgment must be entered in favor of the State of Idaho and against the United States on the federal government's claim that the filing fee provisions of the adjudication statute violate the due process protection against taking property without just compensation under the United States Constitution.

The United States also asserts that the filing fee portions of the adjudication statute violate Article 1, § 14 of the Idaho Constitution which provides that ". . . private property may be taken for public use, but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefore." However, it fails to explicate any reason that it is afforded more protection under the Idaho Constitution than under the United States Constitution. This court is aware of none. It is found that the United States is not a "person" afforded the due process protection of the Idaho Constitution. Should the Idaho "takings" clause be found to apply to the United States, the claim advocated here would fail. Neither I.C. § 42-1414 nor 42-1415 provides for a "taking" of property.

In Idaho, a water right is a property interest entitled to constitutional protection against taking to that just compensation. *Nettleton v. Higginson*, 98 Idaho 87, 90, 558 P.2d 1048, 1051 (1977). It must be noted that the United States makes no claim that the adjudication statutes, in any way, violate its procedural due process rights. The United States specifically claims that a decree which excludes the federal government's water rights because it declined to pay

what it calls "exorbitant" fees would amount to a taking of property without compensation.

The loss of water rights occasioned by their exclusion from a decree in the Snake River Basin Adjudication for a holder's failure to pay filing fees is not a taking of property for public use. The Idaho Supreme Court has stated, "[I]t is well settled that the water itself is the property of the state, which has the duty to supervise the allotment of those waters with minimal waste to private appropriators." *Nettleton v. Higginson*, 98 Idaho at 90, citing Idaho Constitution Article 15 § 1. The claim and filing fee procedures of the adjudication statute constitute a reasonable exercise of the state's constitutional responsibilities with respect to water. The state may condition the continued right to the use of water on reasonable actions required by law on the part of the owner. *Texaco Inc. v. Short*, 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 738 (1982). Failure of an owner to pay filing fees in the Snake River Basin Adjudication is the equivalent to the abandonment of that owner's property interest to the water which may be claimed in this action. The result of the owner's neglect is not a taking of the property by the state for public use, but rather the entry of a court decree which does not include the abandoned water right. The action of the court is predicated on a failure of the owner to place his water right before the court for review and entry in the decree. The loss occasioned by this failure is the equivalent to the entry of judgment against a party who fails to carry his burden of proof. It is upon this failure of proof that an owner who does not pay the required filing fee ultimately looses his water right. In reviewing state action with respect to property rights, the United States Supreme Court has held that:

> In ruling that private property may be deemed to be abandoned and to lapse upon the failure of its owner to take reasonable action imposed by law, this court has never required the state to compensate the owner for the consequences of his own neglect. We have concluded that the state may treat a mineral interest that has not been used for 20 years and for which no statement of claim has been filed as abandoned; it follows that, after abandonment, the former owner retains no interest for which he may claim compensation. It is the owner's failure to make any use of the property—and not the action of the State—that causes the lapse of the property right; there is no "taking" that requires compensation. The requirement that an owner of a property interest that has not been used for 20 years must come forward and file a current statement of claim is not itself a "taking". *Texaco v. Short*, 454 U.S. at 530.

More recently, the Supreme Court has reaffirmed the authority of the state to regulate property rights. Significantly, the Supreme Court has held:

> Even with respect to vested property rights, the legislature generally has the power to impose new regulatory constraints on the way in which those rights are used, or to condition their continued retention on performance of certain affirmative duties. As long as the constraint or duty imposed is a reasonable restriction designed to further legitimate legislative objectives, the legislature acts within its powers in imposing such new constraints or duties. (citations omitted.) "Legislation readjusting rights and burdens is not unlaw-

> ful solely because it upsets otherwise settled expectations."

United States v. Locke, 471 U.S. 84, 104, 105 S.Ct. 1785, 1797, 85 L.Ed. 64 (1985), quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16, 96 S.Ct. 2882, 2893, 49 L.Ed. 782; (1976).

Statutory regulation of water rights through the adjudication process is common to western states. Similarly, failure to comply with claim procedures in those states may result in the forfeiture of water rights by exclusion from decrees. *See*, Ariz. Rev. Stat. Ann. § 45-254 (1987); Mont. Code Ann. § 85-2-226 (1989); Or. Rev. Stat. § 539.210 (1989); Utah Code Ann. § 73-4-9 (1989); Wyo. Stat. Ann. § 41-4-310 (1977). It has not been held in any western state that the forfeiture of a water right for failure to take the reasonable statutory steps for its protection constitutes the taking of property for public use without just compensation. In reviewing its adjudication statute, the Washington Supreme Court has declared that any person who fails to file the required statement of claim is conclusively deemed to have "waived and relinquished any right, title or interest in said right." *In The Matter of Chumstick Creek Drainage Basin*, 103 Wash.2d 698, 694 P.2d 1065, 1069 (1985). It, therefore, appears that there is no legal support for the United States' claim that the loss of water rights for the failure to pay filing fees constitutes an impermissible taking of property for public use without just compensation.

The United States further argues that *Texaco v. Short*, 458 U.S. 516 (1982), and *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed. 631 (1978) require this court

to employ a balancing test, weighing the interest of the state in its regulatory scheme against the individual rights of water claimants, to determine whether the filing fee statutes amounts to a taking of property. The United States, however, fails to place of record any objective facts which allow this court to engage in such a weighing process. The United States simply declares that:

> . . . Idaho has imposed what is in reality an unreasonable and exorbitant tax upon all water right claimants, exceeding $11 million dollars for the United States alone. The economic impact upon all water right claimants is substantial and confiscatory. (U.S. Memo. in Opposition to Motion for Partial Summary Judgment at 31.)

These assertions represent conclusions for which there is presently no support in the record. While the United States argues that such evidence can be presented at trial and, therefore, summary judgment is inappropriate, its position is legally insufficient to resist the instant motion. The burden is upon the party resisting a motion for summary judgment to place facts on the record establishing either entitlement to judgment in its own right or a genuine issue of material fact upon which the matter must proceed to trial. The United States, after more than 18 months since filing its Petition for Writ of Mandamus, relies merely on its pleadings and these conclusory assertions in opposing the motion. The only conclusion this court may draw is that there exists no genuine issue of material fact and that the State of Idaho is entitled to judgment as a matter of law.

Therefore, summary judgment is entered in favor of the State of Idaho and against the United States

with respect to the United States' claim that the filing fees required under the adjudication statutes constitue a taking of property for public use without just compensation in violation of both the Idaho and United States Constitutions.

II.

THE COMMERCE CLAUSE

> Whether Idaho's "filing fees" scheme or the enforcement provisions or both violate the commerce clause, Article 1, § 8 of the United States Constitution. (Issue No. 8, United States List of Issues at 6.)

The issue presented is whether Idaho filing fees violate the Commerce Clause of the United States Constitution. To decide this issue, it must first be determined whether the United States has standing to maintain an action under the Commerce Clause.

A. Standing to Maintain Action Under The Commerce Clause.

The State of Idaho admits that state regulation of water comes within the realm of the Commerce Clause and is subject to congressional regulation because water is transported across state boundaries and is used for agricultural purposes which have a worldwide market. *Sporhase v. Nebraska*, 458 U.S. 941, 953-54, 102 S.Ct. 3456, 3462-63, 73 L.Ed.2d 1254 (1982). Although water is subject to congressional regulation under the Commerce Clause, the state is not prevented from regulating its water resources. *Sporhase v. Nebraska*, 458 U.S. at 954. The State argues, however, that this does not give the United States standing to bring suit under the Commerce Clause. The State asserts that because the United States' ownership and operation of property subject to the Snake River Basin Adjudication is within the State of Idaho, it does not come within the scope of the Commerce Clause.

To determine whether the United States has standing, it is necessary to know whether the government's basis for the claim is as a party with proprietary rights by reason of ownership of land within the State of Idaho or whether it is attempting to "promote the interest of all". The United States has failed to inform this court under which basis it is challenging the filing fees under the Commerce Clause.

"A proprietary interest provides a nonstatutory basis for standing of private persons and would provide a basis for the United States to sue . . . ." *United States v. City of Jackson*, 318 F.2d 1, 15 (5th Cir. 1963). Assuming that the United States' claim under the Commerce Clause is based on its proprietary right as an Idaho land owner and on its pecuniary interest in the controversy, it is found that it has standing to sue. However, the claim fails under the explicit terms of the Commerce Clause.

The Commerce Clause states that Congress shall have the power to "regulate commerce with foreign nations, and among the several states. . . ." U.S. Constitution, Art. 1 § 8. "[T]he foundation of our analysis is the basic principle that '[t]he very purpose of the Commerce Clause was to create an area of free trade among the several States.'" *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 402, 104 S.Ct. 1856, 1865, 80 L.Ed.2d 388 (1984), quoting *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 323, 97 S.Ct. 599, 606, 50 L.Ed.2d 514

(1977). "As used in the Constitution, the word "commerce" . . . includes transportation, purchase, sale, and exchange of commodities between the citizens of the *different states.*" *Carter v. Carter Coal Co.*, 298 U.S. 238, 298, 56 S.Ct. 855, 867, 80 L.Ed. 1160 (1936). (emphasis added). Because the United States' proprietary interest comes from the ownership and operation of property *within the state* and not a different state, it cannot be granted relief under the Commerce Clause.

If the United States' claim is premised on "promoting the interests of all", it also has standing. "[T]he Commerce Clause in itself prohibits obstructions to interstate commerce and . . . the United States has standing to sue for injunctive relief to enforce the Commerce Clause." *United States v. City of Jackson*, 318 F.2d at 14, citing *In re Debs*, 158 U.S. 564, 15 S.Ct. 900, 39 L.Ed 1092 (1895). "The obligations which it [the United States] is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court." *United States v. City of Jackson*, 318 F.2d at 14, quoting *In re Debs*, 158 U.S. at 584.

Although the United States has not stated its position as acting to "promote the interests of all", this court will proceed as if it had. Then the issue becomes who has the burden of proof to show a burden or lack thereof on interstate commerce.

B. Burden of Proof

The test for Commerce Clause challenges to state regulation of natural resources is well-established:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970) (citations omitted).

However, before this test can be applied it must be shown that the statute is discriminatory. The State of Idaho asserts that I.C. § 42-1414 makes no distinction based on the interstate nature of claims, nor unfairly burdens out-of-state individuals or entities. It also argues that the distinctions in filing fees are based solely on the use to which the water is put, irrespective of whether the use, or the benefit of the use, accrues to in-state or out-of-state individuals or entities.

The United States claims that the statute is discriminatory and, therefore, the burden falls to the state to prove that the statute serves a legitimate local purpose and that this purpose can not be served by less discriminatory means. *Maine v. Taylor*, 477 U.S. 131, 138, 106 S.Ct. 2440, 2447, 91 L.Ed.2d 110 (1986). However, the United States fails to show how the statute is discriminatory, relying only on its bold assertion in an attempt to pass the burden to the State of Idaho.

This court does not agree with the United States' claim that the statute is discriminatory. Without evi-

dence that the statute is discriminatory in its application, the only cognizable claim the United States may assert is that the statute is discriminatory on its face. I.C. § 42-1414, on its face, shows no discrimination between in-state and out-of-state water rights holders. *Everyone* claiming a water right must file a notice of claim submitted with a filing fee based solely on the nature of the use.

The United States, by its own admission, states that the burden of proof is on the State of Idaho *once the statute is shown to be discriminatory.* However, the burden is on the United States to show that the statute is discriminatory. This, the federal government has failed to do.

Where the statute is non-discriminatory and applied even-handedly, the Pike Test requires the United States to show that the burden the statute places on interstate commerce is other than incidental or that the burden is clearly excessive. *Pike v. Bruce Church*, 397 U.S. 137 (1970). Once this is shown, the burden shifts to the State to demonstrate that there is a legitimate local purpose to support such a burden on interstate commerce. The United States has presented no evidence to show any burden on interstate commerce. Therefore, the burden has not shifted to the State of Idaho.

Assuming that the United States is attempting to enforce the Commerce Clause to "promote the interest of all", it has standing. However, the United States must show that the statute challenged is discriminatory or that the burden it places on interstate commerce is excessive and not merely incidental. The United States has not presented evidence on either prong of the Pike test which would establish the existence of a genuine issue of material fact. Therefore, as a matter of law, the State of Idaho is entitled to summary judgment on this issue.

III.

WATER RIGHTS CREATED UNDER FEDERAL LAW

> Whether Idaho's "filing fees" may be imposed upon federal or Indian water rights reserved or otherwise created under federal law which "are not dependent upon state law or state procedures, . . ." *Cappaert v. United States*, 426 U.S. 128, 145 (1976), and which are merely abstracted in the director's report. I.C. § 42-1411 (Supp. 1989).
>
> (Issue No. 9, United States List of Issues at 6.)

To the extent this claim is based on the proposition that reserved water rights of the United States created under federal law are to be treated differently in the Snake River Basin Adjudication than federal rights claimed under state appropriation laws, the petitioner cannot prevail as a matter of law. The Idaho Supreme Court, following the lead of the United States Supreme Court, has held that:

> In *United States v. District Court, County of Eagle, Colo.*, 401 U.S. 520, 91 S.Ct. 998, 28 L.Ed.2d 278 (1971), the Supreme Court affirmed a Colorado decree holding that 43 U.S.C. § 666, 66, Stat. 560, (generally known as the McCarran amendment), constituted consent to have the water rights of the United States adjudicated in a state court. In doing so, the court held that 43 U.S.C. § 666 was an all inclusive statutory provision that subjects to general adjudication in state proceedings all water rights of the

> United States to water within a particular state's jurisdiction, regardless of how they were acquired. In so holding, the Supreme Court specificially held that reserved water rights were included within the purview of § 666.

Avondale Irrigation Dist. v. North Idaho Prop., Inc., 96 Idaho 1, 3, 523 P.2d 818, 820 (1974).

The Idaho Supreme Court went on further to hold that,

> We hold that under 43 U.S.C. § 666, the United States is bound by Idaho State law, and therefore must quantify the amount of water claimed under the reservations doctrine at the time of the general adjudication of water rights.

Avondale Irrigation District v. North Idaho Properties, Inc., 96 Idaho at 4-5.

This Idaho Supreme Court decision is fully consistent with that expressed by the United States Supreme Court in *Cappaert v. The United States*, 426 U.S. 128, 96 S.Ct. 2062, 48 L.Ed.2d 523 (1976). *Cappaert* stands for the proposition that federal water rights are not dependent upon state law or state procedures and may be adjudicated in state or federal court since federal courts also have jurisdiction to adjudicate United States water rights claims. *Cappaert* further holds that the McCarran Amendment is not a substantive statute requiring the United States to perfect its water rights claims in the state forum. However, the Supreme Court acknowledged that the McCarran Amendment waived sovereign immunity where the United States is joined as a party in a state court general adjudication of an entire stream system and, therefore, the United

States may be required to adjudicate its water rights in the state forum.

In its brief, the United States fails to draw the correct distinction in the terminology used in *Cappaert*. Under *Cappaert*, the United States, having waived its sovereign immunity under the McCarran Amendment, must appear in a qualified state court adjudication not for the purpose of perfecting its water rights, but rather to adjudicate its water rights. It would appear that, in drawing this distinction, the Supreme Court means that the perfection of water rights relates to the acquisition of legal entitlement to water rights under the law. However, it also appears the Supreme Court means that the United States may be required to have its existing water rights, whether perfected or acquired under federal or state law, quantified in a state court general stream adjudication. This court does not find that the holding in *Cappaert* is in any way inconsistent with the holding in *United States v. District Court in and for the County of Eagle, Colo.* or that of the Idaho Supreme Court in *Avondale Irrigation District v. North Idaho Properties, Inc.* Therefore, the United States has waived sovereign immunity in this general stream adjudication and since the filing fees for reserved water rights are the same as those imposed on all other claimants, the United States' objection must fail.

Finally, with respect to this issue, the United States claims that by applying a filing fee to federal water rights, Idaho has effectuated a diminution in the value of federal property by means of a tax on that property. The government argues that if it fails to pay the filing fees, the property will be diminished in value as a result of the enforcement mechanisms

in I.C. §§ 42-1414 and 1415, which would disallow inclusion of United States water rights in the court's decree. This issue is appropriately raised by the United States in Issues No. 4 and 5 of the United States List of Issues and will be decided in that context.

In conclusion, reviewing United States Issue No. 9, there exists no genuine issue of material fact and the State of Idaho shall be awarded judgment as a matter of law.

IV.

DUE PROCESS

> Whether federal and state guarantees of due process are violated by requiring defendants in a water rights adjudication suit to pay substantial fees merely to file their claims with the plaintiff—State of Idaho at the risk of losing their water rights?
>
> (Issue No. 10, United States List of Issues at 7.)

The issue presented is whether the filing fee portions of the adjudication statutes violate the due process protections afforded the United States under the Fifth and Fourteenth Amendments of the United States Constitution.

The interesting aspect of the United States' challenge is that it has taken the exact opposite position in other litigation where this issue has arisen. In the case of *United States v. South Coast Air Quality Management District, et al.*, 748 Fed. Supp. 732, (D.C.C.D. Ca. 1990), the court found:

> The United States asserts that the United States is not afforded protection under the Fifth or Fourteenth Amendments because the United States is not a "person" protected by these laws.

> The[ ] United States supported this position by citing the following cases: *The United States v. City of Jackson, Mississippi*, 318 F.2d 1, 8 (5th Cir. 1963); *Pennsylvania v. New Jersey*, 427 U.S. 660, 665, 96 S.Ct. 2333, 2336[,] 49 L.Ed.2d 124 (1976); *South Carolina v. Katzenbach*, 383 U.S. 301, 323-24[,] 86 S.Ct. 803, 816, 15 L.Ed.2d 769 (1966).
>
> The United States was correct in the position advocated to the Federal District Court in California. Therefore, the State of Idaho is entitled to summary judgment as a matter of law.

V.

THE APPROPRIATIONS CLAUSE

> Whether the McCarran Amendment, 43 U.S.C. § 666, may be read broadly to permit states to impose "filing fees" and other monetary assessments upon the United States and its property, and whether such a broad reading would result in an unconstitutional delegation to the states of congressional authority to appropriate money.
>
> (Issue No. 11, United States List of Issues at 7.)

The United States asserts that the McCarran Amendment does not authorize the expenditure of money or the creation of financial liability on the part of the United States. The State of Idaho argues that the McCarran Amendment creates a liability on the part of the United States for the payment of adjudication filing fee, but whether there are appropriations for the payment of those fees has no bearing on the legality of the liability created.

This court finds that the McCarran Amendment does create a liability on the United States to pay

filing fees when a claim to a water right is filed under I.C. § 42-1414. The McCarran Amendment provides, in part, that,

> "[t]he United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty . . . ."

By waiving sovereign immunity, the McCarran Amendment creates a liability which requires the United States to pay filing fees in a state court general stream adjudication. The existence of a liability is not contingent upon the existence of an appropriation to pay that liability. "[T]he mere failure of Congress to appropriate funds . . . does not in and of itself defeat a Government obligation created by statute." *New York Airways, Inc. v. United States*, 369 F.2d 743, 748 (Ct. Cl. 1966).

The power to appropriate is one given to congress to direct the Secretary of Treasury to draw money from the Treasury. When a claim is filed with the Department of Water Resources, that claim must be accompanied by a filing fee. Idaho is not seeking a Writ of Mandamus or other court order requiring the United States to pay a filing fee. It is only when the United States files a claim under I.C. § 42-1414 that a fee is required and until a fee accompanies the claim, that claim will not be accepted.

By paying adjudication fees in other state adjudications, the United States has, in some measure, acknowledged its responsibility to pay filing fees under the McCarran Amendment. Since the United States had or obtained the authority to pay fees in those other adjudications, it has the same authority

and, therefore, the same ability to pay them here. It is irrelevant that the fees for this adjudication are larger than those paid in other adjudications. Each agency of the United States anticipating the filing of claims in an adjudication has the responsibility to pay the filing fees from existing funds or seek a specific appropriation from Congress to meet its statutory obligations.

Therefore, the filing fee statutes and Idaho's interpretation of the McCarran Amendment do not result in an unconstitutional delegation to the state of the congressional authority to appropriate. The McCarran Amendment and the adjudication statutes only create a liability. How that liability is paid is the responsibility of the United States when it files claims for water rights. The United States has not shown the existence of any genuine issue of material fact which would preclude the entry of summary judgment on this issue. Therefore Idaho, as a matter of law, is entitled to summary judgment.

VI.

THE ANTI-DEFICIENCY ACT

Whether Idaho's requirement that substantial "filing fees" accompany the claims of the United States violates the Anti-Deficiency Act, 31 U.S.C. § 1341, 1349-1351, and 1511-1519 which prohibits the United States from expending money which has not been appropriated by Congress. If the fees may be imposed upon the water rights of the United States, must the United States be afforded time to seek and obtain from Congress appropriations of money to pay the "fees" before any such "fees" become due.

(Issue No. 12, United States List of Issues at 7.)

The sixth issue presented is whether Idaho's requirement for payment of filing fees violates the Anti-Deficiency Act, 21 U.S.C. § 1341. The United States argues that this act prohibits payment of adjudication fees because those fees are not "authorized by law". Idaho, however, cites several statutes authorizing the United States to pay the fees imposed by I.C. § 42-1414:

> 1) Section 8 of the Reclamation Act of 1902 requires the Bureau of Reclamation to comply with all aspects of state water law, including the paying of filing fees.
>
> 2) 16 U.S.C. § 17j-2 provides that "Appropriations for the National Park Service are authorized for . . . investigation and establishment of water rights in accordance with local custom, law, and decision of courts . . . ."
>
> 3) 16 U.S.C. § 526 provides: "There are authorized to be appropriated for expenditures by the Forest Service such sums as may be necessary for the investigation and establishment of water rights . . . and protection of water rights . . . ."

Based on the existence of these statutes, the United States is precluded from arguing that the payment of adjudication filing fees is not "authorized by law". Moreover, the United States has paid adjudication fees in other state adjudications. This fact indicates that the payment of adjudication fees is "authorized by law".

Assuming that there is no appropriation "authorized by law" for the adjudication, and ignoring the fact that the United States has paid adjudication fees in the past, Idaho argues that lump sum appropriations can be used for the authorized purpose of

paying adjudication filing fees. The United States counters claiming that, through the appropriation process, agencies must follow the budget estimates submitted to congress when spending their subsequent appropriations, even when the appropriation is a lump sum.

As cited by Idaho, the United States Department of Justice, in an opinion by its legal counsel, indicates that lump sum appropriations may be used for any authorized purpose.[1] In fact, several of the federal agencies involved in this adjudication have appropriations that include lump sum appropriations whose stated purpose is to pay adjudication filing fees. Idaho has cited the Department of Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, 103 Stat. 701 (1989) as an example of a lump sum appropriation that may be used to pay adjudication filing fees.[2]

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[1] "The Comptroller General has taken the position that a lump sum appropriation may be used for any authorized purpose, even if the legislative history of the appropriation statute prescribes specific priorities with regard to allocating funds among authorized purposes. . . . By the same token, the absence in the terms of an appropriations act of a prohibition against certain expenditures under that appropriation implies that Congress did not intend to impose restraints upon an agency's flexibility in shifting funds among activities or functions within a particular lump sum account. . . ."

"We believe that, as a general matter, the agency head's discretion to reprogram appropriated funds within or among programs in a lump sum account in an antideficiency situation would be limited only if a specific statutory directive required the expenditure or distribution of funds in a particular manner." 0B—*Opinion of the Office of Legal Counsel, DOJ* 701, 702-03 (June 20, 1980).

[2] $778,419,000 for "expenses necessary for the management, operation, and maintenance of areas and facilities adminis-

The United States' argument that no appropriations exist and that the use of "lump sum" appropriations is not authorized, and, as such, the payment of filing fees constitutes a violation of the Anti-Deficiency Act, is unconvincing. Therefore, there being no genuine issue of material fact, Idaho is entitled to summary judgment as a matter of law.

VII.

THE DISCLAIMER CLAUSE

Whether applying Idaho's "filing fees" scheme and I. C. §§ 2-1414 and 1415 (Supp. 1989) violates Article 21, § 19 of the Idaho Constitution whereby the people of the State of Idaho "forever disclaim[ed]" all right, title and jurisdiction over federal property and Indian lands and further agreed, "That no taxes shall be imposed by the state on the lands or property therein belong-

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tered by the Nation Park Service . . . and for the general administration of the National Park Service . . . ." (103 Stat. at 706).

$1,035,534,000 "for . . . management, development, and improvement and protection of resources . . . under the jurisdiction of the Bureau of Indian Affairs including payment of irrigation assessment and charges, acquisition of water rights . . . ." (103 Stat. at 713).

$1,149,232,000 "for necessary, expenses of the Forest Service, not otherwise provided for, for management, protection, improvement and utilization of the National Forest System . . . ." (103 Stat. at 723).

$63,433,000 "for expenses necessary to carry out the provisions of the Land and Water Conservation Fund Act of 1965, as amended (16 U.S.C. 4601-4-11), . . . and for the acquisition of land or waters, or interests therein, in accordance with statutory authority applicable to the Forest Service . . . . (103 Stat. at 724).

ing to, or which may hereafter be purchased by, the United States, or reserved for its use.

(Issue No. 13, United States list of Issues at 8.)

The issue presented is whether the Idaho filing fee statutes violate Art. 21, § 19 of the Idaho Constitution in which the state disclaims all right, title, and jurisdiction over federal property and Indian lands (the Disclaimer Clause). The United States argues that Idaho's attempted imposition and enforcement of its filing fees in the adjudication process is inconsistent with the Disclaimer Clause in the Idaho Constitution. It asserts that the McCarran Amendment does not give Idaho the right to interfere with or destroy the property of the United States or Indian Tribes.

Idaho counters arguing that Art. 21, § 19 of the Idaho Constitution does not disclaim the state's right to seek filing fees from the federal government and that the fees are imposed to find governmental services, not to obtain interests in land. This court agrees.

In support of its position, Idaho notes that the language of the Disclaimer Clause in the Idaho Constitution is almost identical to that found in the constitutions of Arizona, New Mexico, and Wyoming. These states, as well as the Tenth Circuit Court of Appeals, have rejected the argument that the disclaimer language should be interpreted to prohibit the adjudication of water rights despite the authority given the states under the McCarran Amendment. *United States v. Superior Court*, 144 Ariz. 265, 697 P.2d 658, 669 (1985); *State ex rel. Reynolds v. Lewis*, 88 N.M. 636, 545 P.2d 1014, 1015 (1976); *In re the General Adjudication of All Rights to the Use of Water in the Big Horn River System*, 753 P.2d 76,

87 (Wyo. 1988); *Jacarilla Apache Tribe v. United States*, 601 F.2d 1116, 1130 (10th Cir. 1979). The intention of the disclaimer language is to ensure the supremacy of federal policy and law, and therefore, disclaimers should not be interpreted in a manner which would undermine federal policy. *Big Horn*, 753 P.2d at 87.

The Idaho Supreme Court has interpreted Art. 21 § 19 to allow the state to accept jurisdiction over Indian lands to the extent that federal law allows. *State v. Marek*, 112 Idaho 860, 866, 736 P.2d 1314 (1987). In *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 564, 103 S.Ct. 3201, 3212, 77 L.Ed.2d 837 (1983), the United States Supreme Court held that disclaimer language in the state constitution was not to be construed so as to prevent adjudication under the McCarran Amendment. It ruled that to do so would "enervate the Amendment's objective" of allowing comprehensive adjudications in state court. The same reasoning applies to state authority over non-Indian federal water rights.

The United States further argues that the filing fees are a tax and the disclaimer language bars taxation of the United States beyond that found in the Supremacy Clause. Whether the filing fees constitute a tax is not an issue to be decided in this motion for partial summary judgment.

Finally, the United States has presented no evidence upon which to decide this Disclaimer Clause issue. A party may not rest on mere allegations of the pleadings. The United States has not presented any genuine issue of material fact which bar summary judgment. Therefore, on this issue, Idaho is entitled to summary judgment as a matter of law.

VIII.

THE CONSTITUTIONAL RIGHT TO APPROPRIATE WATER

Whether the filing fee enforcement mechanism of I.C. 42-1415 (Supp. 1989) temporarily or permanently denies water users the right to appropriate water in violation of Article 15, § 3 of the Idaho Constitution which provides that "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied. . . ."

(Issue No. 14, United States List of Issues at 8.)

The United States raises the issue of whether Idaho's filing fee enforcement mechanism, I.C. § 42-1415, violates the Idaho Constitution's protection of the right to divert and appropriate water. It argues that there is a conflict between I.C. § 42-1415 and Article 15 § 3 of the Idaho Constitution. The United States asserts that I.C. § 42-1415 authorizes the state to prohibit the diversion and use of water pursuant to a claimed or decreed right in clear contravention of the state constitutional guarantee that diversion and appropriation of water "shall never be denied".

Idaho denies the existence of a conflict explaining that Article 15, § 3 applies only to statutes denying a claimant the right to make an initial appropriation of water. *State Dept. of Parks v. Idaho Dept. of Water Admin.*, 96 Idaho 440, 530 P.2d 924 (1974); *State Water Conservation Bd. v. Enking*, 56 Idaho 722, 58 P.2d 779 (1936). The state argues that the constitutional provision is limited only to the right to appropriate or divert "unappropriated" waters. Thus, the right only applies when someone tries to divert or appropriate unappropriated waters.

I.C. § 42-1415 does not deny a claimant the right to appropriate unappropriated water nor does it attempt to deny the right to appropriated water. It merely regulates the manner in which a claim to a water right may be verified. The adjudication process is a method of verifying or quantifying an acquired or existing water right. The statutory requirements are a means to accomplish a complete and successful adjudication.

The United States then argues that the "denial" of a water right for failure to pay a filing fee is not within the limited police power of the state over water users. This court disagrees.

The Idaho Constitution provides that, "The use of all waters . . . is hereby declared to be a public use, and subject to the regulations and control of the state in the manner prescribed by law." Idaho Const., Art. 15, § 1. It has been long recognized that the state has the duty to supervise the apportionment and allotment of water being diverted. *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 64 (1960). The state holds an interest and title to all water within the state, not "in the proprietary sense, but rather in the sovereign capacity as representative of all the people for the purpose of guaranteeing that the common right of all shall be equally protected and that no one shall be denied his proper use and benefit of this common necessity." *Walbridge v. Robinson*, 22 Idaho 236, 241-42, 125 P. 812, (1912). As further evidence of this police power, Idaho cites *Nettleton v. Higginson*, 98 Idaho 87, 558 P.2d 1048 (1977). In *Nettleton*, the court upheld a statute authorizing water masters to close the headgates on diversions having no adjudicated, decreed, permitted, or licensed water rights. Therefore, as stated by Idaho, the state has the responsibility and

power to ensure that the water is properly allocated among all water users.

In the Snake River Basin Adjudication, the claimant has the duty to obtain verification and quantification of its water right. This occurs through the adjudication process. The first step for verification and quantification is the filing of a claim in compliance with I.C. § 42-1414. Any failure to do so does not result in a denial of rights by the state, but a self-inflicted harm by the claimant's lack of action. The *Nettleton* decision did not imply that requiring the claimant to bear the expense of adjudicating a water right would constitute a "denial" of such right. *Nettleton v. Higginson*, 98 Idaho at 91-92.

By whatever method a party claims a water right, appropriation, adjudication, decree, permit or license, the state has the power to define the conditions under which the holder of the right may continue to divert water where it is necessary to further the state's interest in the efficient use of water resources. To adopt the United States' interpretation, that failure to pay the filing fee is a denial prohibited by the Idaho Constitution Art. 15 § 3, would forever prevent the state from adjudicating water rights and render the McCarran Amendment impotent.

There being no genuine issue of material fact, the State of Idaho is entitled to summary judgment as a matter of law on this issue.

IX.

THE IDAHO ADJUDICATION STATUTE REQUIRES THE UNITED STATES TO PAY FILING FEE

Whether, in enacting the Adjudication Code Amendments in 1985 and 1986, the Executive

and Legislative branches of state government intended to purport to require the United States to pay filing fees in this adjudication.

(Issue No. 17, United States List of Issues at 9.)

The United States claims that a review of I.C. §§ 42-1414, 42-1409, and 42-1408(A)(1)(j) reflects an ambiguity in the legislation on the issue of whether or not the United States is required to pay filing fees. It argues that the court must, therefore, turn to extrinsic evidence on the issue of whether the legislature intended the United States to pay filing fees. The United States concludes that a review of the legislative history surrounding the adoption of the filing fees statutes shows that the Idaho Legislature did not intend to require filing fees from the United States.

The law governing statutory interpretation is well settled. In interpreting a statute, the court must first look to the four corners of the statute, giving plain meaning to the language used and determine whether an ambiguity exists. If none is found, the court is required to interpret the statute without resort to extrinsic evidence, including legislative history. *Roe v. Hopper*, 90 Idaho 22, 408 P.2d 151 (1965); *State v. Moore*, 111 Idaho 854, 727 P.2d 1282 (Ct. App. 1986).

I.C. § 42-1414 unequivocally provides that all notices of claims required to be filed in the adjudication must be accompanied by a filing fee. The filing fee requirement expressly and unambiguously applies to all notices of claim required by I.C. § 42-1409.

I.C. § 42-1409 sets forth two forms to be used in filing notices of claim. The first is for claims filed under state law; the second is to be used for the claim of a water right reserved under federal law. Reading

these two statutes, *in pari materia*, the legislature unambiguously required filing fees to accompany all claims in the adjudication whether predicated on federal or state law.

I.C. § 42-1408A(1)(j) reads:

> (j) section 42-1414, I.C. requires each claimant, other than those exempted by federal law, to pay a variable fee . . . .

This section of the adjudication statute, when read with I.C. §§ 42-1414 and 42-1409 does not constitute a blanket exemption from filing fees as argued by the United States. It is the clear statement by the legislature that where federal law exempts a claimant from the payment of filing fees no fee will be required. The statute is written in terms of "those exempted" by federal law, and does not name specifically or exclusively the United States. By using the general, all inclusive term in the statute, the Idaho Legislature meant to exempt any and all claimants exempted by federal law, which may include the United States. The United States reads the statute far too broadly when it claims that it is a clear and unequivocal blanket exemption from filing fees for the United States. The Idaho Legislature could have easily specifically exempted the United States from the filing fees requirement by so stating. By using this general language, the legislature has simply acknowledged that where federal law requires, the exemption must be honored. Therefore, the statutory scheme set up by the Idaho Legislature unambiguously requires all claimants to pay filing fees. A claimant who is entiled to an exemption under federal law must make its claim, in the first instance, to the Idaho Department of Water Resources. If the Department agrees, it

may accept the claim without a filing fee. If the Department disagrees, it will reject the claim unless the required filing fee is paid. In this instance, the claimant requesting exemption under federal law may bring its claim before the court. This is what the legislature intended to happen and is precisely what the United States has done.

Since the statute is not ambiguous, there exists no genuine issue of material fact. Based upon this court's interpretation of the statutory filing fee scheme in Idaho, the State of Idaho is granted summary judgment on this issue as a matter of law.

X.

IDAHO OPEN MEETING LAW

Whether the development of the fee schedule violated the Idaho Open Meeting Law, I.C. § 67-2340 through 2347, and if so, whether the fee schedule is void.

(Issue No. 18, United States List of Issues at 9.)

The record reflects that Idaho Governor John D. Evans, Idaho Attorney General Jim Jones, and Idaho Power Company Chief Executive Officer, James Bruce, established an *ad hoc* citizens advisory committee (the Committee) to analyze tand make recommendations on a proposed fee schedule for the Snake River Basin Adjudication. The Committee, made up of state officers and private citizens, reviewed the filing fee issue and recommended fee schedules to the three people who set up the Committee. These recommendations were later proposed to the Idaho State Legislature for inclusion in the Snake River Basin Adjudication statutes.

There is no factual dispute that the Committee did not meet in conformity with the Idaho Open Meetings Law. The United States contends that, since the Committee did not comply with the Open Meeting Law, the filing fee schedule, as adopted, is void.

The reading of the Idaho Open Meeting Law, advocated by the United States, constitutes interpretative prestidigitation in the extreme and is without legal support whatsoever.

I.C. § 67-2342 requires that:

> (1) All meetings of a governing body of a public agency shall be open to the public and all persons shall be permitted to attend any meeting except as otherwise provided by this act. No decision at a meeting of a governing body of a public agency shall be made by secret ballot.

The issue presented is whether the Committee is a "governing body of a public agency" under the law.

I.C. § 67-2341(3) defines "public agency" as:

> (a) any state board, commission, department, authority, educational institution or other state agency which is *created by or pursuant to statute*, ... (emphasis added.)

There is no genuine issue of material fact with respect to the creation of the Committee. No evidence exists indicating that the Committee was created by or pursuant to statute. Therefore, the claim of the United States utterly fails under the clear, explicit and unequivocal terms of the statute.

The absurdity of the United States' claim under the Open Meeting Law is underscored by its request that the matter proceed to trial because, "Discovery from

the Gardner Committee's members (the Committee) will likely reveal that they developed the 'fee' structure in closed meeting, perhaps under strict instructions from the parties to the 'Swan Falls dispute', recommended it to public agencies such as the Idaho Water Resources Board, and assisted in presenting it as a fait accompli to the Idaho Legislature." (U.S. Memo. in Opposition to Idaho's Motion for Partial Summary Judgment at 64.)

This claim belittles the legislative process surrounding adoption of the Snake River Basin Adjudication statutes and misreads the Idaho Open Meeting Act in a manner which offends the most basic notions of the constitutional separation of powers doctrine.

The record is eminently clear that the Committee was not a public agency under the terms of the Open Meeting Act and only served to place recommendations before the legislature. The legislature was under no obligation to accept these recommendations any more than it would be to accept proposed legislation from any source. The United States position is mistaken.

The United States further requests that this matter proceed to trial so that the court can review the legislative history surrounding the adoption of the filing fee statute to determine whether that statute was conscientiously considered by the legislature in compliance with the Opening Meeting Law. In support of this proposition, the government cites *State v. City of Hailey*, 102 Idaho 511, 633 P.2d 576 (1981), which deals with actions taken by the Hailey City Counsel, a body which falls within the purview of the Open Meeting Law. There is no question but that the Idaho State Legislature is similarly covered by the Open Meeting Law. However, there is nothing in the rec-

ord, other than bold assertions by the United States, that the legislature failed to meet its responsibilities under the statute and as further defined in *City of Hailey*.

The court unequivocally declines the invitation of the United States to ". . . determine conclusively what 'filing fee' question were 'conscientiously' presented to or considered by the Idaho legislature." (United States Memo. in Opposition at 65.) The United States wishes to have this court conduct a trial to determine how carefully the legislature considered various aspects of the filing fee issue. This request for second guessing the exercise of legislative discretion is wholly outside the bounds of the Idaho Open Meeting Law and is violative of rudimentary principles of the constitutional separation of powers doctrine.

The failure of the United States to present any facts that would support the conclusion it has chosen to draw about the adoption of the filing fee statute requires this court to enter summary judgment on behalf of the State of Idaho and against the United States. As with other issues this court has discussed relative to the State's motion for partial summary judgment, the United States cannot resist a motion for summary judgment by resting on its pleadings. This matter was filed over 18 months ago and the inability of the United States to present any objective evidence on this issue causes this court to conclude none exists. The government's inability to present such evidence is fatal to its position on the instant motion.

Therefore, there being no genuine issue of material fact with respect to the adoption of the filing fees statute by the Idaho State Legislature, summary judg-

ment is entered for the State of Idaho and against the United States as a matter of law.

DATED this 27 day of December, 1990.

/s/ Daniel C. Hurlbutt, Jr.
DANIEL C. HURLBUTT, JR.
District Judge

APPENDIX D

[R. 919-928]

IN THE DISTRICT COURT
OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF TWIN FALLS

Case No. 39576

IN RE THE GENERAL ADJUDICATION OF RIGHTS TO THE USE OF WATER FROM THE SNAKE RIVER BASIN WATER SYSTEM

THE STATE OF IDAHO, EX REL. R. KEITH HIGGINSON in his official capacity as director of the Idaho Department of Water Resources, PETITIONER

vs.

THE UNITED STATES; STATE OF IDAHO; and all claimants to the use of water from the Snake River Basin Water System, DEFENDANTS

MEMORANDUM DECISION

State of Idaho motion for Summary Judgment on Issues Numbered 1 and 2, UNITED STATES LIST OF ISSUES REGARDING IDAHO'S FILING FEES". *Granted.*

The State of Idaho seeks summary judgment on Issues Numbered 1 and 2 raised by the United States

in its list of issues relating to the requirement to pay filing fees in the Snake River Basin Adjudication. The United States alleges these issues as grounds supporting its Petition for Writ of Mandamus compelling the Director of the Idaho Department of Water Resources to accept all United States claims to water rights without the payment of filing fees set forth in I.C. § 42-1414.

The State's motion for partial summary judgment is reviewed under the well settled legal principles governing such motions. Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. In determining whether any issues of material fact exist, all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, must be construed in the light most favorable to the non-moving party, I.R.C.P. 56(c); *Sewell v. Nielson, Monroe, Inc.*, 109 Idaho 192, 706 P.2d 81 (Ct.App. 1985). When a motion for summary judgment is supported by facts of record, the opposing party must not rest upon bare allegations or denials in its pleadings. *Verbillis v. Dependable Appliance Co.*, 107 Idaho 335, 337, 689 P.2d 227, 229 (Ct.App. 1984).

I.

THE SUPREMACY AND PROPERTY CLAUSES

> Whether the imposition of Idaho's "filing fees", or any other monetary assessment upon the water rights of the United States, is barred by the Supremacy Clause, Art. VI or the Property Clause, Art. IV, § 3 of the United States Constitution.
>
> (Issue No. 1, United States List of Issues at 2-3.)

The requirement that the United States pay a filing fee as set forth in the Idaho adjudication statutes is not barred by the Supremacy or the Property Clauses of the United States Constitution. The *McCarran* Amendment, 43 U.S.C. § 666, is a clear and unambiguous broad waiver of sovereign immunity in a highly specialized case, the general adjudication of water rights in an entire stream system. This congressional waiver was intended to include the waiver of certain statutory and Constitutional immunities, including the Supremacy and Property Clauses of the United States Constitution.

Congressional waiver of federal rights which might operate to preclude the United States' participation in an adjudication and deference to the adjudication laws of an individual state is not a novel concept.

> . . . [T]he modern liberal view toward waivers of sovereign immunity by Congress, congressional policy of conformance with state laws concerning federal water rights, the inherent nature of water adjudication suits, the legislative history of Section 666 and its obvious purpose, the very terms of the section, and the limited jurisdiction of federal courts, combine to make manifest the clear intent of Congress that the waiver of immunity under Section 666 operates in suits brought in state courts. *In re Green River Drainage Area*, 147 Fed. Supp. 127, 134-135 (D. Utah 1956).

When Congress adopts broad statutory language consenting to suit, it must be treated as a deliberate act. The act of adoption of broad language "is not to be thwarted by unduly restrictive interpretations". *Canadian Aviator Ltd. v. The United States*, 324 U.S. 215, 222, 65 S.Ct. 639 (1945).

To resolve the issue presented by the United States, this court must interpret the *McCarran* Amendment. The rules governing statutory construction are well settled. The court must first look to the four corners of the statute and give plain meaning to the terms used. Effect must be given to every word, clause and sentence so as to implement every provision and not render any portion inoperative, superflous, void or insignificant. *Roe v. Hopper*, 90 Idaho 22, 408 P.2d 161 (1965); *State v. Moore*, 111 Idaho 854, 727 P.2d 1282 (Ct.App. 1986); *Ohio v. U.S. Dept of Energy*, 904 F.2d 1058 (6th Cir. 1990) *citing*, *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 n.20, 96 S.Ct. 1375, 1384, n.20 (1976); *Southerland Stat. Const.*, § 46.01, 46.04 (4th ed. 1984). Further, it is a well accepted rule of law that the language of a statute is ordinarily regarded as conclusive and a presumption exists that the words to a statute express the intent of the legislature. *See, e.g., North Dakota v. United States*, 460 U.S. 300, 103 S.Ct. 1095 (1983); *Moorhead v. The United States*, 774 F.2d 936 (9th Cir. (1985)); *Southerland Stat. Const.* § 46.04 (4th ed. 1984).

Reviewing a federal waiver of sovereign immunity, it has been held that:

> A waiver of sovereign immunity must be clear, express and unambiguous; it cannot be implied from vague language. (citations omitted.)
>
> In determining whether a waiver is clear, the controlling factor is the "underlying congressional policy." (Citation omitted.) We must avoid the temptation to seek any hint of ambiguity that can be used to twist the statute into denying sovereign immunity. (citation omitted.) When Congress enacts a clear waiver, that waiver should not be 'thwarted by an unduly restrictive interpretation' in the courts. (citation omitted.)

Ohio v. The United States Department of Energy, 904 F.2d 1058, 1059-60 (6th Cir. 1990).

The language of *McCarran* has been broadly applied by the United States Supreme Court, as intended by Congress. In *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 103 S.Ct. 3201, 77 L.Ed.2d 827 (1983), the issue was whether the *McCarran* Amendment included consent to the determination of federal reserved rights held on behalf of Indian tribes. The court ruled:

> Not only the Amendment's language, but also its underlying policy, dictates a construction including Indian rights in its provisions (citation omitted) . . . The Amendment deals with an all-inclusive statute concerning 'the adjudication of rights to the use of water of a river system' . . . (citation omitted.)
>
> In sum, considering the important federal interest in allowing all water rights on a river system to be adjudicated in a single comprehensive state proceeding . . . excluding [Indian water] rights from its coverage would enervate the Amendment's objective . . . (citations omitted.)
>
> [T]he clear federal policy evinced by that legislation is the avoidance of piecemeal adjudication of water rights in a river system. This policy is akin to that underlying the rule requiring that jurisdiction be yielded to the court first acquiring control of property, for the concern in such instances is the avoiding the generation of additional litigation through permitting inconsistent dispositions of property. This concern is heightened with respect to water rights, the relationships among which are highly interdepend-

> ent. Indeed, we have recognized that actions seeking the allocation of water essentially involve the disposition of property and are best conducted in unified proceedings. *The consent to jurisdiction given by the McCarran Amendment bespeaks a policy that recognizes the availability of comprehensive state systems for the adjudication of water rights as the means for achieving these goals.*

San Carlos, at 551-552. (emphasis added.)

As a guide to reviewing congressional intent to waive immunity, the Supreme Court has commented that:

> In determining whether there is a waiver of sovereign immunity, that determination "is accomplished not by a 'ritualistic formula'; rather, intent to waive immunity and the scope of such a waiver can only be ascertained by reference to underlying congressional policy." (citation omitted).

Franchise Tax Board of California v. The United States Postal Service, 467 U.S. 512, 521, 104 S.Ct. 2549, 2554 (1984).

The ordinary, contemporary and common meaning of the language of *McCarran* is that Congress waived *all rights* to assert any facet of sovereign immunity in a general adjudication of all water rights in an entire stream system which is being conducted in accordance with state law. This includes protections otherwise afforded under the Supremacy or Property clauses of the United States Constitution.

Congress recognized that a general stream adjudication is a very large and specialized case. The policy and purpose of McCarran would, therefore, be defeated if the United States' water rights were not

included in such an adjudication. There is no doubt that congress intended the United States' water rights be adjudicated in qualified cases and Congress adopted the *McCarran* Amendment in furtherance of that goal. In so doing, Congress recognized and acknowledged the benefit to the sovereign if its water rights were adjudicated and administered in one process in the State courts.

The plain language of McCarran could not be clearer. The United States specifically consented to be joined as a party in the adjudication and administration of the Snake River Basin System. The United States specifically consented to the waiver of any right to argue that Idaho's laws are not applicable to the United States; and, further, the United States waived the right to argue that the United States was not amenable to Idaho's laws by reason of any aspect of "sovereignty". Since Congress determines the scope of the waiver of sovereign immunity, this court must give full effect to that waiver. *United States of America v. South Coast Air Quality Management District, et al.*, 748 F. Supp. 732 (D.C.C.D. Ca. 1990).

Therefore, the waiver of sovereign immunity embodied in the *McCarran* Amendment constitutes a waiver of protection under the Supremacy and Property Clauses of the United States Constitution. There being no genuine issue of material fact on this issue, the State of Idaho is granted summary judgment as a matter of law.

II.

THE DOCTRINE OF SOVERIGN IMMUNITY

> Whether the United States is immune by virtue of the doctrine of sovereign immunity from the imposition of filing fees in this law suit.
>
> (Issue No. 2, United States List of Issues at 3).

The resolution of this issue rests on the same principles governing summary judgment and statutory interpretation as set forth in Section I, above.

The *McCarran* Amendment waiver of sovereign immunity was intended as a waiver of any federal claim to exemption under the general doctrine of sovereign immunity. This is also true on the issue of the filing fee requirement contained in the Idaho statute. Congress' understanding of the specialized nature of general adjudications of entire stream systems necessarily included in understanding of the costs which might be involved in such cases. *McCarran* specifically exempts the United States from paying any "judgment for costs". No exception for filing fees was mentioned. Given Congress' intent to allow general stream adjudications to proceed in state court for the good of all water claimants, including the United States, it is unreasonable to read into *McCarran* any exemptions other than that explicitly stated. If Congress had intended to exempt the United States from paying filing fees, it was well able and empowered to so state. It did not. This court cannot, therefore, create such an exception where Congress declined to. By specifically enumerating one exception in *McCarran*, congressional silence on other exceptions takes on meaning. This court interprets Congress' silence as a purposeful decision not to establish any further exceptions.

The United States is essentially asking this court to rewrite 43 U.S.C. § 666 and specifically include an additional exemption for the United States that the United States does not have to pay filing fees required by state law. The United States has been paying filing fees "under protest" in various state adjudications for years. Should Congress, in the future, desire to exempt the United States from paying filing fees in order to accomplish participation in the administration and adjudication of its water rights, Congress can amend *McCarran* to make clear its intention to exempt the United States from payment of filing fees. There being no genuine issue of material fact or this United States' claim, the State of Idaho is granted summary judgment as a matter of law.

III.

ISSUES TO BE RESOLVED BY TRIAL

Notwithstanding the United States position that whether the statutorily imposed filing fees amount to a "fee" or a "tax" is irrelevant, it is found that the United States bears the burden of proof to establish that it is exempt from the payment of filing fees because they constitute an illegal or "disguised tax" upon the United States.

The United States further bears the burden of proof to establish that the *McCarran* exception from paying a judgment for costs includes an exemption from paying filing fees required by the statute.

This Memorandum Decision constitutes this court's findings of fact and conclusions of law herein. Counsel for the State of Idaho is to prepare proposed order, submitting copies to the court and counsel for review and entry.

IT IS SO ORDERED.

DATED this 24th day of January, 1991.

/s/ Daniel C. Hurlbutt, Jr.
DANIEL C. HURLBUTT, JR.
District Judge

APPENDIX E

[R. 1031-1059]

IN THE DISTRICT COURT
OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF TWIN FALLS

Case No. 39576

IN RE THE GENERAL ADJUDICATION OF RIGHTS TO THE USE OF WATER FROM THE SNAKE RIVER BASIN WATER SYSTEM

THE STATE OF IDAHO, EX REL. R. KEITH HIGGINSON in his official capacity as director of the Idaho Department of Water Resources, PETITIONER

vs.

THE UNITED STATES; STATE OF IDAHO; and all unknown Claimants to the use of water from the Snake River Basin Water System, DEFENDANTS

MEMORANDUM DECISION

United States Petition for Writ of Mandamus compelling the Director of the Idaho Department of Water Resources to accept the filing of U.S. water rights claims without the payment of statutory filing fees. *Denied.*

This matter is before the court following a trial on the United States' Petition for a Writ of Mandamus (Mandamus) ordering the Director of the Idaho Department of Water Resources to accept the filing of United States water rights claims in the Snake River Basin Adjudication without the payment of filing fees as required by I.C. § 42-1414.

This matter has procedurally progressed as follows: The United States filed a Petition for Writ of Mandamus or, Alternatively, for Declaratory and Injunctive Relief on June 30, 1989. The United States filed a "List of Issues regarding Idaho's 'Filing Fees'" which identified 20 issues which the United States believed were issues to be litigated. On December 27, 1990, this court entered partial summary judgment as to issues numbered 7, 8, 9, 10, 11, 12, 13, 14, 17 and 18. On January 24, 1991, this court entered partial summary judgment as to issues numbered 1 and 2. Left for resolution are issues 3, 4, 5, 6, 15, 16, 19 and 20.

I. NATURE OF ACTION AND BURDEN OF PROOF

The United States has the affirmative burden of proof of establishing the following five (5) elements in order for mandamus to issue: 1) A clear and complete right to have the act performed; 2) A clear legal duty on the part of the respondent to perform said act; 3) That it is within the power of the respondent to perform the act; 4) That the respondent has failed or refused to perform act and; 5) That there is no adequate remedy at law. *See, e.g., Lewis v. Mountain Home Co-Op Irrigation Co.*, 28 Idaho 682, 691, 156 P. 419 (1916).

Where a Writ of Mandamus is requested, the burden of proof is governed "by the general rule that the party holding the affirmative of the issue must establish his allegations by a preponderance of the evidence." *Ferris*, Extraordinary Legal Remedies, § 253 (1926) (Ferris).

While the United States has at times invoked equity in its claim for mandamus, it must be noted that mandamus is "an extraordinary legal remedy with which equity has nothing to do, and in consideration of which no equitable rights or principles can be taken into consideration except solely for the purposes of determining whether, in the exercise of legal discretion, the Writ should issue." Ferris, § 190. A party moving for mandamus must,

> . . . Show an unqualified right to the Writ . . . (I)n its final analysis the question for determination is whether the right of the aggrieved party is so free from doubt, and the duty of the officer is so clear from any substantial question, that an order should issue to compel performance. The office of mandamus is to execute, not adjudicate. It does not ascertain or adjust mutual claims or rights between the parties. If the right be doubtful, it must first be established in some other form of action; mandamus will not lie to establish, as well as enforce a claim of uncertain merit. *Ferris*, § 194.

Idaho courts frame the issues in a mandamus proceeding on the basis of whether there is a *clear legal right to* have the act performed as requested by the petition and whether there is a *clear legal ministerial duty* on the part of the official to perform that duty. *See, e.g., Felton v. Prather*, 95 Idaho 280, 506 P.2d 1353 (1973).

The court must consider the facts as they presently exist and in "a mandamus proceeding against a public officer involving the performance of official duties, the inquiry is generally limited to the question of the officer's duty on the face of the statute and the ministerial character of the duty he is charged to perform." *Mandamus*, 55 C.J.S., § 334.

The threshold issue is whether there exists a plainly defined and preemptory duty on the part of the Director to accept the United States' filing of water rights claims for processing in the Snake River Basin Adjudication without the payment of statutory filing fees. This requires the interpretation of the Adjudication Statutes to determine the nature and extent of the Directors' duties with respect to the acceptance of claims and collection of filing fees.

II. CLEAR LEGAL DUTY

The United States contends that I.C. § 42-1414 and I.C. § 42-1408A(1)(j) establish a clear legal duty requiring the Director to accept federal claims without the payment of filing fees. Paraphrased, I.C. § 42-1414 requires the United States to pay the statutorily defined filing fees at the time that it files federal water right claims unless, in accordance with I.C. 1408A-(1)(j), the United States is exempted by operation of federal law.

The United States has claimed federal and State of Idaho legal bases which qualify it for exemption under I.C. § 42-1408-(1)(j): 1) that the language of the *McCarran* Amendment, 43 U.S.C. § 666, is so broad that its exemption from payment of a "judgment for costs" includes the payment of filing fees, and 2) that the statutory filing fees are an illegal or disguised tax from which the United States is

exempted under Article VI of the United States Constitution and Article 7, § 4 and Article 21, § 19 of the Idaho Constitution.

A. "Judgment For Costs" Exemption.

The *McCarran* Amendment provides, in relevant portion, that:

> Consent is hereby given to join the United States as a defendant in any suit 1) for the adjudication of the rights to the use of water of a river system or other source . . . Provided that no judgment for costs shall be entered against the United States in any such suit.

43 U.S.C. § 666.

The determination of the United States' claim that the *McCarran* Amendment's exemption from a "judgment for costs" prohibits the Director from collecting a filing fee is a matter of statutory interpretation invoking the long standing rules surrounding this judicial task.

The court must first look to the four corners of the statute and give plain, ordinary and common meaning to the terms contained therein. Effect must be given to every word, clause and sentence so as to implement every provision of the statute and not render any portion inoperative, superfluous, void or insignificant. The language of the statute is ordinarily regarded as conclusive and a presumption exists that the plain words of a statute express the intent of the legislature. *Southerland Stat. Const.*, § 46.01, 46.04 (4th Ed. 1984); *Roe v. Hopper*, 90 Idaho 22, 408 P.2d 161 (1965); *State v. Moore*, 111 Idaho 854, 727 P.2d 1282 (Ct.App. 1986); *Ohio v. United States Department of Energy*, 904 F.2d 1058

(6th Cir. 1990); *North Dakota v. United States*, 460 U.S. 300, 103 S.Ct. 1095 (1983). This framework is well settled in Idaho jurisprudence.

> When interpreting the meaning of the language contained in a statute, this Court's task is to give effect to the legislature's intent and purpose. (Citation omitted.) In construing a statute, the Supreme Court may examine the language used, reasonableness of the proposed interpretations, and the policy behind the statutes. (Citation omitted.) It is incumbent upon this Court to interpret a statute in a manner that will not nullify it, and it is not to be presumed that the legislature performed an idle act of enacting a superfluous statute. (Citation omitted.) The Supreme Court will not construe a statute in a way which makes mere surplusage of provisions included therein. (Citation omitted.) 'It is the duty of the courts in construing statutes to harmonize and reconcile laws whenever possible and to adopt that construction of statutory provision which harmonizes and reconciles it with other statutory provisions'. (Citation omitted.) 'Any ambiguity in a statute should be resolved in favor of a reasonable operation of the law'. (Citation omitted.) When construing the language contained in a statute, this Court will construe statutory terms according to their plain, obvious, and rational meanings. (Citations omitted.) *Sweitzer v. Dean*, 118 Idaho 568, 798 P.2d 27, 30-32 (1990).

The first inquiry is whether 43 U.S.C. § 666 is ambiguous. As in every case involving the interpretation of a statute, analysis must begin with the language employed by Congress. *Rubin v. United States*,

449 U.S. 424, 101 S.Ct. 698, 66 L.Ed.2d 633 (1981). The Idaho Supreme Court has stated that, "Under these circumstances it is of importance to determine what is meant by 'ambiguity'. The term has been defined as doubtfulness, doubleness of meaning or indistinctness or uncertainty of meaning of an expression used in a written instrument." (citations omitted). *Roe v. Hopper*, 90 Idaho 22, 26-27, 408 P.2d 161 (1965).

Applying this standard to *McCarran's* use of the term "judgment for costs", this court holds that 43 U.S.C. § 666 is not patently ambiguous. Nothing on the face of the statute raises an issue of uncertainty of meaning, doubtfulness, or indistinctness or doubtfulness of meaning.

The next inquiry is whether the legal term of art "judgment for costs" contained in 43 U.S.C. § 666 manifests a latent ambiguity.

When the terms of a statute are unambiguous, judicial inquiry comes to an end, except in rare and exceptional circumstances when it is necessary to override the literal terms of a statute in order to avoid an absurd result. *See, e.g., Crooks v. Harrelson*, 282 U.S. 55, 60, 51 S.Ct. 49, 75 L.Ed. 156 (1930).

> It has been held that even if the words of the statute are plain and unambiguous on their face the court may still look to the legislative history in construing the statute if the plain meaning of the words of the statute is at variance with the policy of the statute or if there is a clearly expressed legislative intention contrary to the language of the statute.

Southerland Stat. Const., § 46.01; 47.29 (4th Ed. 1984.)

At trial, judicial notice was taken of the adjudication statutes which existed at the time the *McCarran* Amendment was being considered by Congress in what have been referred to as the seventeen "western states". Those adjudication statutes allowed the costs of the adjudication of water rights between private parties to be assessed against the parties at the conclusion of the litigation.

Notwithstanding these statutory provisions, this court does not find the existence of a latent ambiguity in the *McCarran* Amendment's use of the term "judgment for costs" which is a specific, well-defined and commonly understood legal term of art. Therefore, resort to extrinsic evidence, including legislative history would be improper. There exists no clearly expressed legislative intent which is contrary to the language of 43 U.S.C. § 666 in its ordinary sense as a legal term of art.

In the absence of legislative intent to the contrary or other overriding evidence of a different meaning, technical terms or terms that are used in a statute are presumed to have their common technical meaning. *Southerland Stat. Const.*, § 47.29 (4th Ed. 1984).

In parsing the term "judgment for costs", "costs" have been defined as:

> . . . (S)tatutory allowances to a party to an action for his expenses incurred in the action. They are in the nature of incidental damages allowed to the successful party to indemnify him against the expenses of asserting his rights in court, when the necessity for so doing was caused by the others breach of a legal duty . . . A party claiming a judgment for costs against an adversary must bring himself within the operation of some statutory provision.

Costs, 20 Am. Jur.2d § 1; § 5.

Generally, the "costs of an action are ordinarily included in the final judgment and are collected with that judgment at the same time and in the same manner; that is by the issuance of an execution against the property of the debtor." *Costs*, 20 Am. Jur.2d § 95.

The term "judgment" has been defined as follows:

> A judgment is the law's last word in a judicial controversy. It is the result of the application of legal principles to the state of facts presented to the court. It may be defined as the court's official and final consideration and determination of the respective rights and obligations of the parties . . . *Judgment*, 46 Am. Jur.2d § 1.

The common technical meaning of the term "judgment for costs" is best reflected in the language in Rule 54 of the Federal and Idaho Rules of Civil Procedure.[1]

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[1] IRCP 54(a). Judgments-Definition-Form.—"Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

IRCP 54(d)(5). Memorandum of costs.—At any time after the verdict of a jury or a decision of the court, any party who claims costs may file and serve on adverse parties a memorandum of costs, itemizing each claimed expense, but such memorandum of costs may not be filed later than fourteen (14) days after entry of judgment. Such memorandum must state that to the best of his knowledge and belief the items are correct and that the costs claimed are in compliance with this rule. Failure to file such memorandum of costs within the period prescribed by this rule shall be a waiver of the right of costs. A memorandum of costs prematurely filed shall be considered as timely.

In support of its claim to exemption, the United States points to several expenditures already made in the Snake River Adjudication which it contends fall within the definition of "judgment for costs" and are includible as costs under I.R.C.P. 54. These are:

1) Attorney fees and related deposition costs, I.R.C.P. 54(d)(1)(9)(10);
2. Service of Process, I.R.C.P. 54(d)(1)(C)(2);
3. Judicial expenses, I.R.C.P. 54(d)(1)(E); and
4. Expert and lay witnesses and investigation and studies/exhibits, I.R.C.P. 54(d)(1)(C)(3)(6) and (8).

The United States has previously acknowledged the propriety of using filing fees to defray the costs of the administration of the adjudication process incurred by the judiciary. (Transcript, Hearing on

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FRCP 54. Judgments; Costs

(a) Definition; form

"Judgment as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(d) Costs

Except when express provision therefor is made either in a statu[t]e of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

Motion for Partial Summary Judgment, October 16, 1990, p.p. 52-54).

The same United States' claim to exemption from filing fees was decided by the Colorado Supreme Court in the case of *United States v. City and County of Denver*, 656 P.2d 1 (Colo. 1983). The court ruled against the United States, affirming decisions of the trial court and the Master-Referee who held:

> The *McCarran* Amendment's prohibition against judgments for costs clearly precludes an award of such judgments to parties opposing the United States. The prohibition does not, however, excuse the United States from paying a filing fee. The imposition of a filing fee on the United States is not a judgment for costs. While filing fees of opposing parties might otherwise be included in their judgment for costs against the United States, such judgments are prevented by the *McCarran* Amendment. In other words, the *McCarran* Amendment merely prevents the United States from being forced to pay the filing fees of its opponents. It does not excuse the United States from paying its own.

Partial Report of the Master-Referee report covering all of the claims of the United States of America filed in *In the Matter of the Application for Water Rights of the United States of America*, Colo. Dist. Ct. Water Div. no. 4, W-425 through W-438; Colo. Dist. Ct., Water Div. no. 6, W-85 through W-86; State of Idaho Exhibit 192.

In its affirmance, the Colorado Supreme Court stated that:

> Payments were made under protest on the theory that the United States had not consented to liability for such fees. The water court held, however, that the United States, by consenting to suit through the *McCarran* Amendment, became subject like other parties to the obligation to pay filing fees."

City and County of Denver, at 15. Ultimately, the United States agreed to pay the filing fees required by Colorado law. *Id.*, at 20-21, FN #33.

This court agrees with the interpretation adopted and reasoning expressed in *United States v. City and County of Denver, Id.* Nothing has been presented at trial which avoids the logic of the Colorado decision. The *McCarran* Amendment is a clear and concise statement by Congress that it has waived sovereign immunity and consented to be made a party in State court in general adjudications of entire stream systems. The exemption from payment of a "judgment for costs" is equally clear and does not exempt the United States from paying filing fees.

Interpreting "judgment for costs" as a legal term of art disallows the interpretation advanced by the United States. To adopt an interpretation contrary to the common technical meaning ascribed to "judgment for costs" would violate the plain meaning of Congress' wording as expressed in *McCarran*. The United States has repeatedly argued that it is exempt from paying filing fees in adjudications throughout the west. Nine years has passed since the Colorado Supreme Court ruled against the United States on this issue and Congress has yet to express a different intent. If Congress intended a broader exemption, it would, could, and still can, amend the *McCarran* Amendment and exempt the United States from paying filing fees.

It is, therefore, held that the *McCarran* Amendment, 43 U.S.C. § 666, does not exempt the United States from paying the filing fees required by I.C. § 42-1414 in the Snake River Basin Adjudication.

B. "Disguised Tax" Exemption

This court has previously held that the filing fees contemplated by I.C. § 42-1414 do not constitute a "tax" upon the United States. *See* Memorandum Decisions dated December 28, 1990; January 24, 1991.

Not every economic exaction directed against the federal government rises to the level of a "tax" simply because the exaction itself exists. In this action, the United States has the burden of establishing that this constitutionally permissible fee statute is a "disguised tax" based on the manner in which the filing fees are being expended.

The United States claims the filing fees deposited into the adjudication account, account 9337, are not being spent for purposes reasonably related to the administration and adjudication of water rights in the Snake River Basin and, as such, the filing fees have become a disguised tax against the federal government.

The facts in this case are unlike those in *Massachusetts v. United States*, 435 U.S. 444, 98 S.Ct. 1153, 55 L.Ed.2d 403 (1978) and, therefore, the *Massachusetts* three-pronged test is not controlling. At issue here is whether the money received from this constitutionally permissible fee statute is being applied or expended in such a fashion as to render the fee a "disguised" tax.

At trial, the United States sought an evidentiary hearing based on the three-pronged test set out in *Massachusetts, supra*. In granting Idaho Power Company's motion *in limine*, the United States was precluded from collaterally attacking this court's prior holdings as they relate to whether, on its face, the fee statute is a "tax" *per se*.

This denial of the United States' request to conduct an evidentiary proceeding employing the *Massachusetts* test is supported by the *United States v. City of Columbia, Missouri*, 709 F.Supp. 174 (W.D. Mo. 1989). There, the District Court reasoned that the court in *Massachusetts, supra*, assumed, without discussing, that the fee exaction at issue *was a tax*. *City of Columbia*, at 178. The assumption which controlled the *Massachusetts* court's reasoning is directly opposite the holding by this court in the Snake River Basin Adjudication that the filing fee is *not* a tax *per se*.

The trial court in *City of Columbia* concluded that the appropriate test is that set forth in *United States v. Maryland*, 471 F.Supp. 1030 (D.Md. 1979) stating that:

> . . . [T]he Supreme Court in *Massachusetts* borrowed a test it first used in *Evansville-Vanderburgh Airport Authority v. Delta Airlines, Inc.*, (citation omitted.) The issue presented in *Evansville* was whether a charge by a state or municipality of $1 per commercial airline passenger to help defray the costs of airport construction and maintenance was an unreasonable burden on interstate commerce in violation of the Commerce Clause of the United States Constitution . . .
>
> [T]he test used in *Massachusetts* and *Evansville* was intended to prevent essential state functions and interstate commerce from being burdened by excessive taxation. The *Massachusetts*

test provides a standard to determine at what point the amount of tax becomes too burdensome to pass Constitutional muster.

Both the Maine (*United States v. Maine*, 524 F. Supp. 1056 (D.Me. 1981)) court and the United States in the instant matter have misapplied the *Massachusetts* test. In their attempts to determine whether a certain charge is a tax, they have improperly seized on a test designed to set the parameters for determining whether the amount of a tax is constitutionally permissible . . .

[T]he correct approach for determining whether a charge is a tax is found in *United States v. Maryland*, 471 F. Supp. 1030, 1036 (D.Md. 1979). In determining whether an environmental surcharge imposed on private utility companies by the state to fund an Environmental Trust Fund was a tax, the court relied both on the Supreme Court's definition of a tax in the *United States v. LaFranca*, 282 U.S. 568, 51 S.Ct. 278, 75 L.Ed.551 (1931) and on an illuminating discussion about the nature of a tax in *National Cable Television Association v. United States*, 415 U.S. 336, 340-41, 94 S.Ct. 1146, 1148-49, 39 L.Ed.2d 370 (1974). A tax is an 'enforced contribution to provide for the support of [the] government'. (citation omitted.) Distinguishing between a tax and a fee, the Supreme Court has stated that, 'a public agency performing . . . services may exact a fee for a grant which, presumably, bestows a benefit upon the applicant, not shared by other members of society'. (citation omitted.) Stated another way,

> a tax is money taken by a government to be used for public purposes. (citation omitted.)

City of Columbia, at 178-179.

On appeal, the court in *United States v. City of Columbia, Missouri*, 914 F.2d 151 (8th Cir. 1990) reversed, and held, that while the trial court had correctly applied *LaFranca* and *National Cable*, it had relied too heavily on the fact that the utility payments were deposited into the city's general revenue fund which benefited the general public and not just the utility company customers. The Court of Appeals stated:

> We do not believe that our holdings that the PILOT is not a tax is contrary to the supreme Court's statement in *LaFranca* that '(a) tax is an enforced contribution to provide for the support of the government . . .' (citation omitted.) The United States, as well as the district court, relied on this language as though it provided a litmus test for determining whether or not a charge is a tax. *We do not think the court in LaFranca intended by the above-quoted language to establish broadly that in all instances where money is exacted for support of government the payment constitutes a tax.* The court in *LaFranca* did not state that its description of a tax to serve as a singular approach to ascertaining whether something is a tax. Rather, the court used that language as a broad description of the nature of a tax . . . 914 F.2d 151 at 156. (emphasis added.)

This court's denial of the United States' request to proceed under the three-pronged *Massachusetts* test is further supported by Congressional consent to be

made a party and be subject to the laws and courts of the state of Idaho in a general stream adjudication. (43 U.S.C. § 666.)

In *United States v. South Coast Air Quality Management District*, 748 F. Supp. 732 (D.C.C.D. Cal. 1990), the *South Coast* court aptly described the *Massachusetts* test as applying when "determining whether a fee could ever be imposed on one sovereign by another sovereign absent a waiver of sovereign immunity. Thus, *this three part analysis has no application when one sovereign consents to the application of a fee by another sovereign.*" *South Coast*, *Id.*, at 741. (emphasis added.)

The court elaborated further:

> If the government can show that the tax would be illegal as applied to a private party, then such tax or fee would be illegal as applied to the United States . . . .
>
> It must be presumed that Congress considered the risks involved with the United States pressing claims in state courts when it waived sovereign immunity.

South Coast, *Id.*, at 740.

Applying the tests enunciated in the *LaFranca*, *supra*, and *National Cable*, *supra*, this court heard evidence on expenditures made from the 9337 account to determine whether the filing fee money is being used for public purposes. At trial, the United States put on evidence on expenditures from the adjudication account, the 9337 account, which it believes are improper: 1) salaries, benefits and travel expenses of attorneys and other staff employed by the Idaho Department of Water Resources; 2) expenditures related to utilizing the negotiation process to

resolve water claims; 3) contracts for water monitoring programs, ground water models and service of process; and 4) one erroneous expenditure for an Idaho Water Resource Board member charged to the 9337 account.

1. Idaho Department of Water Resources Staff

The United States contends that the Director of the Department of Water Resources should not be able to fund legal counsel or other staff assisting him in complying with, performing and implementing his duties under the adjudication statutes from the filing fee account. This court disagrees.

The main thrust of the United States' argument is that counsel and staff to the Director serve in a capacity which is adversarial to theirs. However, in using the term "adversarial", care must be taken in its application to the adjudication process. When the Director is performing a duty which is part of the administration of the adjudication as set out in the statutes, he is entitled to have staff support to assist in the performance of those duties. Where the Director or his staff perform acts which are reasonably and rationally related to his statutory duties, costs associated with the performance of those duties may be born by the adjudication account. In so far as the activities of the Director and any expenditures made on behalf of those activities are reasonably and rationally related to his duties under the adjudication statutes, he is neither a adversary nor an adversarial party. In performing his duties leading to the issuance and filing of the Director's reports, he acts in a quasi-judicial capacity. When the Director proceeds outside his quasi-judicial statutory capacity, and becomes a party opponent in this litigation matter, costs

associated with such efforts become a general revenue obligation of the state.

Here, the adjudication statute requires the Director to collect a filing fee from all claimants who are not otherwise exempted by the adjudication statute or federal law. Expenses incurred by the Director in opposing the United States' Petition for a Writ of Mandate are properly related to the Director's statutory function as set forth in I.C. § 42-1414. It is, therefore, concluded that money expended from the adjudication account, the 9337 account, for the benefit of the Director's defense in this filing fee dispute, including staff and attorneys, are reasonably and rationally related to his duties under the adjudication statutes. These expenses are deemed proper and do not convert the filing fees into a disguised tax upon the United States.

2. Negotiations to Resolve Water Claims

The United States also challenges the salary and related expenses of David Shaw, Idaho Department of Water Resources, Adjudication Bureau Chief, for time spent in negotiations leading to the resolution of water claims, specifically those of the Shoshone-Bannock Tribes. The United States contends such expenditures are not authorized by the adjudication statutes. This court disagrees.

The adjudication statute provides that negotiated settlements may be included in the Director's report. (I.C. § 42-1411). The statute, therefore, contemplates the conduct of negotiations on water claims and settlement of those claims which then can be included in the Director's report. However, any negotiations conducted after the filing of the Director's report fall within the context of litigation and cannot be charged against the adjudication account. The

Director's quasi-judicial function of working toward negotiated settlements prior to the filing of the Director's report is an important part of his duties.

The expenditures from the adjudication account related to negotiations, including those of David Shaw and attorneys, are reasonably and rationally related to the duties of the Director in the administration of the adjudication. They are expenses properly paid from the adjudication account and do not convert the filing fees into a form of disguised tax against the United States.

3. U.S.G.S. Contracts

The United States further challenges expenditures from the adjudication account for two United States Geological Service (U.S.G.S.) contracts arguing that it is improper to pay for a water monitoring program and a ground water model out of the 9337 account where the programs will be used for more than the Snake River Basin Adjudication and in Idaho Department of Water Resources departments other than the Adjudication Division. The United States also objects to these expenditures because the programs predate the adjudication commencement order. The federal government claims that these studies are of no assistance to the Director in issuing the Director's Report because of the limited information they contain which is related to the nature and extent of water rights claims. Finally, the United States believes that these studies should not be paid out of the adjudication account because they are related to the administraiton of water rights as distinguished from the determination or quantification of water rights. This court disagrees.

There was a great deal of testimony presented at trial about the unique nature of the Snake River

aquifer and the interdependence of surface and ground water throughout Southern Idaho. The evidence reflects that the U.S.G.S. studies will assist the Director in the preparation of the Director's Report. Significantly, no testimony or evidence was introduced rebutting Dr. Brockway's characterization of these studies as "essential" to the adjudication process.

The administration and management of water rights is an integral component of the adjudication process, factually and statutorily (I.C. § 42-1406A, 42-1412(8), 42-1417(3); 43 U.S.C. § 666). The fact that these studies were begun prior to entry of the commencement order, that they will be useful in departments other than the adjudicaiton division and that the majority of funding for the studies was shifted to the state's general account in fiscal 1991, avoids the central inquiry in deciding their propriety as an expense of the adjudication. The proper inquiry is whether the expenditure is reasonably and rationally related to the adjudication process and the Director's duties under the adjudication statutes.

It is found that the U.S.G.S. contracts, as well as the contracts related to service of process and notice conducted by the Director pursuant to statute, are necessary and are reasonably related to the Director's statutory duties in the Snake River Basin Adjudication. The expenditures may appropriately be charged to the adjudication account and do not constitute a disguised tax against the United States.

4. Expenditure For Water Board Member

The United States, after reviewing thousands of vouchers and several annual audits covering all Department of Water Resource expenditures from the

adjudication account, discovered one plane ticket which was erroneously charged to that account. The plane ticket was for Mr. Gray, a Director of the Idaho Water Resource Board. David Shaw admitted, under examination, that account 9337 was improperly charged for this plane ticket and that he would immediately see that the error was corrected.

David Shaw testified at length about the Department's review process for all expenditures out of the 9337 account. There is presently in place a defined duty and mechanism to correct accounting errors of this type. He testified that the review process had uncovered errors in the past which were corrected.

There have been tens of thousands of expenditures and this one expenditure slipped through the review process. The careful scrutiny of the 9337 account by the United States, with the finding that there was but one error, speaks well of the account review process presently in place. A simple bookkeeping error does not render the filing fees a "tax".

III. CONCLUSION

Congress consented to appear in a state court general stream adjudication and to the conclusive effect of the laws of Idaho in the adjudication of United States' water rights. The exaction of a filing fee for achieving Congressional intent as expressed in the *McCarran* Amendment, does not interfere with the performance of any federal function or duty. The filing fee is a reasonable charge assessable upon an "identifiable receipt for a measurable unit or amount of government service or property from which he derives special benefit." *Federal Power Commission v. New England Power Company*, 415 U.S. 345, 349, 94 S.Ct. 1151, 1154 (1974). The ultimate beneficiary,

the United States, is well served by having its water rights administered and adjudicated. This benefit is not obscure and the service which the United States receives, the quantification and prioritization of its water rights, cannot be "primarily considered as benefiting broadly the general public." *Id.*; *See also, National Cable Television Association v. United States*, 415 U.S. 336, 94 S.Ct. 146 (1974).

This court's research has not disclosed any Idaho authority directly on point. Instructive are those cases which analyze a municipality's police power and which give guidance on when a "fee" is transformed into a "tax" by the manner in which the money is being expended.

In *Kootenai County Property Association v. Kootenai County*, 115 Idaho 676, 769 P.2d 553 (Idaho 1989), the Idaho Supreme Court found that the county's imposition of an annual solid waste disposal fee was reasonable even though owners could not opt out of the plan and that the fee was not a tax within the meaning of Idaho's Constitution. The Court found that charging a flat residential sewage fee was reasonable even though the actual use (outflow volume) varied somewhat from house to house.

The property association argued that "when the benefit derived is a benefit to the general public, fees to provide the benefit must be considered a tax. A fee, according to the association, is voluntarily paid for specific services while a tax is involuntarily obtained for the general public benefit. *Kootenai County*, at 679.

Here, the Snake River Basin Adjudication filing fees are not charged to every person or citizen of the State of Idaho. The filing fees are charged only if one has a water right for which a claim is filed, adjudicated and administered. The filing fees do not fund a general public benefit or service. This court's holding that the filing fee is a valid exaction and not a disguised tax is consistent with Idaho precedent.

The United States failed to meet its burden of proof to establish that, 1) the United States has a clear and complete right, under federal law, to have the Director accept the United States' water claims without payment of filing fees; 2) that the Director has a clear legal duty, a plainly defined and peremptory duty, to accept the United States' water claims without payment of filing fees, and 3) that it is within the power of the Director to accept the United States' water claims without payment of filing fees.

Having failed to meet the elements necessary for the issuance of a Writ of Mandamus, the United States' Petition for a Writ of Mandamus is denied.

The United States and the State of Idaho in post-trial briefing have advised the court that Issues 5, 6, 15, 19 and 20 as identified by the "United States' List of Issues regarding 'filing fees'" are "either subsumed in prior rulings or have been withdrawn by the parties." (Memorandum in Support of the United States' Motion for Judgment After Trial, February 25, 1991, p. 4, footnote 2; Memorandum in Opposition to United States' Motions, March 8, 1991, p. 2).

The United States contends that Issue 16 is unresolved:

> Whether Idaho's projection of filing fees revenues and adjudication expenses have been or are reasonable or rational. If there is a surplus in the water resources adjudication account at the conclusion of the Snake River Basin Adjudication, are the water right claimants entitled to a

pro-rata refund of unspent proceeds in the account? What remedies exist for claimants to ensure that the moneys in the fee account are not wasted or diverted for purposes other than the adjudication of water rights?

The United States, in its post-trial briefing attempts to move this court for an order for an "accounting" pursuant to I.R.C.P. 53(d)(3). The United States asks this court to construe Issue 16 as the basis for such a motion.

The controlling pleading before the court, is the Petition for Writ of Mandamus or, Alternatively, for Declaratory and Injunctive Relief, filed June 30, 1989. The Petition does not ask the court for an order compelling an accounting pursuant to I.R.C.P. 53(a)(3). The legal issue of whether an accounting should be ordered was not expressly or impliedly tried to the court.

The court finds that the question framed by Issue 16—"If there is a surplus . . . *at the conclusion* of the adjudication, *what remedies exist* . . . to ensure moneys . . . are not wasted or diverted . . ." is speculative and premature. The court cannot and will not give advisory opinions nor can the court decide a matter absent a case or controversy. However, one portion of Issue 16 has been disposed by the court's ruling on the Petition for Mandamus. The court implicitly finds that Idaho's projections of filing fees revenues and adjudication expenses have been or are reasonable or rational because the challenged expenditures from the 9337 have been or are reasonably and rationally related to the adjudication.

Notwithstanding the United States' position that Issue 5 has been subsumed by this court's prior holding on Issue 1, Issue 5 is fully resolved by this Memorandum Decision.

This Memorandum Decision, therefore, disposes of the following remaining issues, identified by the United States' List of Issues regarding Idaho's "filing fees":

Issue 3: Whether Idaho's "filing fees"—amount to a) judgment for costs; b) a security for damage or costs; c) are in violation of the doctrine of sovereign immunity, and d) are in violation of the "American Rule."

Issue 4: Whether Idaho's "filing fees" operate as a disguised tax on the federal government, its water rights, or both in violation of the Constitutions and laws of the United States and the State of Idaho.

Issue 5: Whether the payment of filing fees interferes with the federal government's management of property.

Issue 16: Whether the projections of filing fees, revenues and adjudication expenses have been or are reasonable and rational.

This court finds that Issue 6, whether Idaho may prohibit diversion and use of water for failure to comply with the schedule for payment of filing fees, is not ripe for review in this proceeding.

This memorandum decision constitutes the court's findings of fact and conclusions of law herein. Counsel for the State of Idaho is to prepare a proposed order reflecting this decision, submitting copies to the court and counsel for review and entry.

IT IS SO ORDERED.

DATED this 11th day of April, 1991.

/s/ Daniel C. Hurlbutt, Jr.
DANIEL C. HURLBUTT, JR.
District Judge

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In The

Supreme Court of the United States

October Term, 1992

UNITED STATES OF AMERICA,

Petitioner,

v.

STATE OF IDAHO, EX REL. DIRECTOR,
IDAHO DEPARTMENT OF WATER RESOURCES,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Idaho

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

The question presented is whether the McCarran Amendment, 43 U.S.C. § 666(a), waives the United States' right to plead that it is immune from complying with Idaho's general stream adjudication statute, including payment of filing fees for special services rendered by the Idaho Department of Water Resources and the judiciary to all claimants, including the United States.

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No. 92-190

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

OPINIONS BELOW

Petitioner's Appendix (Pet. App.) fully sets forth the opinions below, except as noted on page 23, n. 18, *infra*.

STATUTES INVOLVED

The principal statutory provisions, 43 U.S.C. § 666 and Idaho Code § 42-1414, are fully set forth in the Petition. The Idaho water rights adjudication statute, Ch.

14, Title 42, Idaho Code, is set out in the appendix to this Brief.

STATEMENT OF THE CASE

A. The Snake River Basin Adjudication

In 1987, the Director of the Idaho Department of Water Resources (IDWR) filed the petition to commence the Snake River Basin adjudication (SRBA). The Director served notice on the United States that it was required to file with IDWR any claims to use of water from the Snake River Basin within Idaho. The United States now refuses, based upon reason of its sovereignty, to comply with Idaho's adjudication procedures requiring that claims be accompanied by the filing fees specified in Idaho Code § 42-1414.

In large part, this case arises from the unique circumstances of the SRBA. The SRBA encompasses about 87 percent of the total area of the State of Idaho, approximately 72,694 square miles.[1] Over 50 percent of the land within the Snake River Basin, approximately 36,347 square miles, is owned by the United States. Transcript ("Tr.") Vol. VI, 948.

The SRBA is the largest stream adjudication ever tried in Idaho. Tr. Vol. VI, 947. Indeed, the scope of the SRBA dwarfs that of other stream adjudications. IDWR

[1] This is an area over seven times as large as the approximately 9,304 square miles in the entire State of New Hampshire. WEBSTER'S NEW WORLD DICTIONARY at 695, 958 (2d College Ed. 1972).

received over 90,000 non-federal claims in the SRBA as of February 5, 1991, including claims from other state agencies. Tr. Vol. VI, 952. The United States has estimated that the number of its state and federal law claims will exceed 30,000,[2] thus bringing the total number of claims in the SRBA to over 120,000.

B. Development of Western General Stream Adjudications

The adjudication procedures in the SRBA have evolved from over 100 years of water rights litigation. Water is a scarce and valuable resource in the arid West. The need to transport water from distant sources to farms, cities, or other places of use, was and continues to be necessary. In order to accommodate this need, specialized forms of water rights and judicial proceedings to confirm those rights have developed in the western states.

Local courts early on began to allocate water supplies on the basis of "first in time . . . first in right." *Jennison v. Kirk*, 98 U.S. 453, 461 (1879). A water right was "acquired" by diverting the water from its natural watercourse and applying it to some "useful" or "beneficial" purpose. In times of water shortage, the right to divert the available water supply is determined by the date upon which a person perfected his water right, starting with the earliest right and proceeding chronologically down the list of rights until the water is exhausted. This

[2] Clerk's Record ("Rec.") Vol. II, 248, 253-55, 261, 272, 279, 285; Rec. Vol. III, 505.

method of water allocation is known as the prior appropriative water rights doctrine.[3]

Because of competition for the limited water supply, conflicts often arose over who had the better water right. Initially, these conflicts were settled in quiet title actions. The proof of appropriative water rights in quiet title actions, however, proved to be cumbersome. As this Court recognized in *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 819 (1976), appropriative water rights are highly interdependent. This interdependency means that to completely define a single water right, all users from a water source must be before the court. Each water right must be compared with every other water right from a water source to determine the relationship between it and the other rights. The joinder of thousands of claimants in a single quiet title case made adjudication of water rights a judicial nightmare.

Most western states responded to the problem of determining the relationship between water rights from a water source by enacting a special statutory procedure called a water rights adjudication. The purpose of this legislation was to create an efficient procedure to resolve the sharp conflicts over use of limited water resources. *See* Idaho Exhibits 243-269. The method chosen by most western states was to assign to a state engineer, or his

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[3] This doctrine was of such overriding importance to the welfare of the new states created from the public domain that many states, including Idaho, incorporated the doctrine into their constitutions. Idaho Const. art. XV, § 3.

statutory equivalent,[4] the responsibility to join or identify all persons diverting water from the water source, to prepare an analysis of the hydrology of the water source and to determine the inter-relationship between claims to the water.[5] Based upon this information, the state engineer develops a proposed list of water rights. The state

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[4] A state engineer is an executive branch officer who has specialized training regarding hydrology and administration of water rights. The Director of the Idaho Department of Water Resources is the present statutory equivalent in Idaho of the State Engineer.

[5] The theory of a river or system adjudication is to fix each appropriators [sic] rights and priorities so it will be definitely known whether he is or is not injuring another by taking his water. While it partakes of the nature of a declaratory judgment in many of its aspects, it also involves a number of local controversies which, instead of being tried as individual suits, are tried on objections to the findings of the State Engineer, all in one overarching suit. For the reason that there are involved numerous local controversies which are adjudicated by the decree and a declaratory judgment in reference to uncontested findings, thus combining not only many controversies in one suit but controverted and uncontroverted adjudications in the same suit, provision had to be made by statute. . . . The scheme was . . . to constitute the State Engineer the officer whose survey and findings would separate the contestants from the non-contestants and in that manner alone save endless effort and time which would ensue if it were done in a court room, and to make him a preliminary arbitrator of such disputes, the action of the court being on his findings when the same were contested.

Spanish Fork Westfield Irrig. Co. v. District Ct. of Salt Lake County, 104 P.2d 353, 364 (Utah 1940) *cited in* 6 WATERS AND WATER RIGHTS, § 531 at 511 (R. Clark ed., 1972), n.20.

engineer's findings, when complete, are subject to review and modification by a state court. Once the list of water rights is approved by a court, it becomes the basic document used to distribute the water rights.

Because water rights are interdependent, it is essential that all claimants be joined and bound by the court's decree. Given the large number of water rights claimed by the United States in the west, Congress recognized that the absence of the United States would effectively destroy the states' ability to adjudicate water rights. Thus, it enacted the McCarran Amendment, 43 U.S.C. § 666, to assure that the United States could not frustrate state water rights adjudications by asserting its sovereign immunity.

C. Idaho Adjudication Procedures

In Idaho, IDWR petitions the district court for an order commencing the adjudication.[6] Idaho Code § 42-1406A. Idaho Code § 42-1408A requires IDWR to serve notice of the order commencing the adjudication (1) on the United States, (2) on the State of Idaho, and (3) on each person listed on the real property assessment rolls. IDWR served about 450,000 first round notices in the SRBA. Tr. Vol. VI, 952.

[6] This explains why IDWR and its director, Keith Higginson, are identified as "petitioner" in the case caption. IDWR holds no water rights and therefore is not a claimant in an adjudication. Thus, IDWR is not a "plaintiff" but, rather, acts as a fact finder for the court. *See* discussion at pages 10-11, *infra*.

Persons claiming water rights are required to forward their claim, on a specified form, to the IDWR. The claims must be accompanied by a filing fee.

The role of the IDWR is to facilitate the adjudication by providing assistance to claimants in the filing of their claims, by reviewing the claims and by preparing a report on all claims.[7] In order to assist claimants in filing claims, the IDWR makes extensive information available to claimants, including specially prepared hydrologic studies, computer modelling and orthophotoquad maps. Tr. Vol. IV, 610; Idaho Code § 42-1410(4). Other resources made available to the court and all claimants include IDWR's database of water right records. Tr. Vol. VI, 1059.

Upon receipt of the claims, IDWR investigates the claims. The investigation involves a number of stages. Initially, a determination is made whether the claims conform with existing IDWR water right records such as decrees or licenses. If IDWR's comparison of a claim with its records discloses discrepancies, then a further review of in-house materials such as maps and aerial photographs is undertaken. A field investigation may be required to resolve any discrepancies such as a determination of diversion rates. Tr. Vol. VI, 971-972, 979-981. Finally, this factual review may disclose a need for review

[7] It is essential that claims be complete and correct. Tr. Vol. VI, 955. As a consequence, IDWR provided extensive assistance to all claimants. This assistance ranged from a person asking IDWR to prepare their claim for them to the other extreme of merely receiving the claim and filing fee through the mail with no contact. Tr. Vol. VI, 954. In the latter case, over seventy-five per cent of the claims had to be returned because of faulty or incomplete information. Tr. Vol. VI, 954-955.

by technical personnel, legal counsel or by policy makers. Tr. Vol. VI, 981-982.

IDWR collects and investigates the claims based upon state law, and presents its recommendations to the district court, along with abstracts of the claims based upon federal law, in the form of a report. Idaho Code §§ 42-1409; 1410; and 1411. The recommendation includes the director's findings regarding each water right claimed and a listing of how each water right relates to other rights contained in the report.

If no objection is received to IDWR's recommendations, then the claims as recommended are decreed without further proof. Idaho Code § 42-1412(9). If an objection is filed to a recommendation, then the claim is submitted to the court and a hearing on the objection is held by the district court. Idaho Code § 42-1412. Claimants bear the burden of proving their claims to water if an objection is filed, and often are in an adversary posture among themselves. *See, Nevada v. United States*, 463 U.S. 110, 139-140 (1983). After all objections are resolved by the court, a decree is entered that lists the rights to the water source and is used to distribute the water supply. Idaho Code § 42-1413.

D. The Nature of Idaho's Filing Fees

Idaho law requires that each claim of a water right be accompanied by a filing fee. The amount of the filing fee varies with the nature of the water right and the amount

of water claimed.[8] The enormous scope of the SRBA has led to substantial filing fees for many of the larger claimants. For example, the Idaho Power Company has paid $4,653,671 in filing fees as of October 23, 1989. Rec. Vol. I, 190. Agencies of the State of Idaho have paid fees of about $3.3 million.[9] Tr. Vol. VI, 1059. Although the ultimate amount the United States will pay is yet to be determined, the fact that it owns over fifty percent of the land area within the adjudication ensures that the United States will have a vast number of claims, and accordingly the total fees paid by the United States will be substantial.

Once received, the filing fees are placed in a dedicated Adjudication Account. Monies in the account are appropriated annually by the Idaho Legislature to pay for

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[8] The United States misrepresents the fees required by Idaho Code § 42-1414 when it states that "the variable filing fees fall more heavily upon sovereign claimants, such as the United States and Indian Tribes that are entitled to file notice of claims to instream flows." Petition at 8. The implication is that Idaho skewed the fee schedule to apply more heavily on the United States. This implication is unwarranted. First, the record indicates that the largest single category of claims for the United States will be for stock watering and domestic use, *see*, citations, n.9, *supra*, for which no variable fee is imposed. Second, the statement is misleading because it fails to acknowledge that the claims made by State of Idaho executive agencies include instream flow claims to which the variable fee applies. Tr. Vol. IV, 591.

[9] These filing fees by state agencies do not come out of the Adjudication Account. Tr. Vol. VI, 1060. These fees, as well as any other expenses of the agency, are paid from the general fund account or other dedicated fund accounts and not the adjudication account.

the extensive services provided by IDWR and the judiciary to the claimants, as described in section C *supra*. Idaho Code §§ 42-1414(3) and 42-1777. An expense is charged to the Adjudication Account if the activity "is necessary . . . to carry out the director's duties under the adjudication statute." Tr. Vol. VI, 1005.

The filing fees in the SRBA are not used to pay adversarial "litigation" costs of the State.[10] The district court undertook an extensive examination of the expenditures funded by the filing fees in a three day trial to determine if the filing fees are essentially an alternate method of assessing a judgment for costs. After reviewing the director's statutory duties and the evidence presented at trial, the district court reasoned:

> In so far as the activities of the Director and any expenditures of the Director and any expenditures made on behalf of those activities are reasonably and rationally related to his duties under the adjudication statutes, he is neither an adversary nor an adversarial party. In performing his duties leading to the issuance and filing of the Director's reports, he acts in a quasi-judicial capacity. When the Director proceeds outside his quasi-judicial statutory capacity, and becomes a party opponent in this litigation matter,

[10] The United States throughout its Petition asserts that the filing fees pay the "State's" costs. It raises a misperception by doing so. The filing fees are used only to pay for the special services provided by the Idaho judiciary and Department of Water Resources to the claimants in this adjudication, pursuant to statutory mandate.

> costs associated with such efforts become a general revenue obligation of the state.[11]

Pet. App. at 107a-108a.

The Idaho Supreme Court likewise rejected the United States' characterization of IDWR's role under Idaho law in this adjudication as that of an ordinary party litigant:

> A general water adjudication brought by the state is analogous to an interpleader action. . . . The position of the director of the Department of Water Resources is analogous to the "stakeholder" in an interpleader action. The director is really a disinterested party. The only interest the director has is to see that all rights are accurately adjudicated.

Pet. App. at 15a-16a (citation omitted). As a "disinterested" party in the SRBA, IDWR will in no sense "prevail" when the adjudication is completed.

REASONS FOR DENYING THE PETITION

SUMMARY OF ARGUMENT

1. There is no dispute in this case regarding the Court's standards for construing waivers of sovereign

[11] The district court made this statement in the context of the issue of whether the filing fees are disguised taxes, yet the determinations made therein are fully applicable to the issue of whether the filing fees constitute a judgment for costs. A general revenue obligation would not be paid from the filing fees placed in the adjudication account.

immunity. The Idaho Supreme Court appropriately followed those standards. The dispute hinges on the United States' disagreement with the Idaho Supreme Court's determination that the language of the McCarran Amendment plainly and unambiguously waives the sovereign immunity of the United States from compliance with state adjudication statutes, including filing fee requirements.

2. The Idaho Supreme Court's decision is consistent with the other decisions by this Court construing the McCarran Amendment as waiving the United States' right to plead that it is not amenable to state laws regarding general stream adjudications. The decision is also consistent with the two other reported decisions construing the McCarran Amendment to require the United States to pay state filing fees. Further, during the forty years since the enactment of the McCarran Amendment the United States has consistently paid filing fees in adjudications around the West. The only reason for this appeal is the size and nature of the present adjudication. This is no basis for review by the Court.

ARGUMENT

1. When construing waivers of sovereign immunity, the Idaho Supreme Court correctly observed:

> The waiver of immunity must be expressed in the statutory text in question and not from extraneous sources. *United States v. Nordic Village, Inc.*, 1992 Slip Op. 90-1629; *Dellmuth v. Muth*, 491 U.S. 223, 228-229, 109 S. Ct. 2397, ___ (1989); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 105 S. Ct. 3142 (1985).

Pet. App. at 7a. The Idaho Supreme Court further noted that:

> The extent of the waiver is not to be extended beyond the "clear and unambiguous" language of the statute. *Hancock v. Train*, 426 U.S. 167, 179, 96 S. Ct. 2006, 2013 (1976).

Pet. App. at 7a. Applying these rules explicitly to the McCarran Amendment, and after examining possible alternative constructions of the language as suggested in *United States v. Nordic Village, Inc.*, 112 S. Ct. 1011, 1016 (1992), the Idaho Supreme Court concluded:

> No hypothetical, no alternate construction technique, can limit or alter the clear waiver of immunity of 43 U.S.C. § 666(a), nor cause "costs" to mean "filing fees."

Pet. App. at 12a-13a.

The United States cites numerous cases of the Court for the proposition that waivers of sovereign immunity must be unequivocal and not be enlarged beyond what the language requires, as if the mere citation to those cases renders the language of the McCarran Amendment unclear and the Idaho Supreme Court's decision wrong. Petition at 12-14. In fact, it is the United States that uses an analytic approach that is inconsistent with numerous rulings of this Court.

As the Court has stated, "the 'unequivocal expression' of elimination of sovereign immunity that we insist upon is *an expression in statutory text.*" *Nordic Village*, 112 S. Ct. at 1016 (emphasis added). The United States cites *United States Dep't of Energy v. Ohio*, 112 S. Ct. 1627 (1992), regarding the Resource Conservation and Recovery Act

and Clean Water Act, and *Nordic Village*, regarding the Bankruptcy Code, to show that the Idaho Supreme Court's decision is wrong. Rather than have the Court carefully examine the McCarran Amendment itself, the United States would have the Court find ambiguity based upon decisions regarding unrelated statutes.

The correct approach is to examine the language of the McCarran Amendment and determine the scope of the waiver explicitly and unambiguously contained in that language. The Idaho Supreme Court correctly found:

> The United States Supreme Court in *Nordic Village* found sections 106(a) and (b) of the Bankruptcy Code to *clearly express* a waiver of immunity by the United States as to "monetary liability." The language of 43 U.S.C. § 666(a), just as plainly as the Bankruptcy Code did in 106(a) and (b), express [sic] a "clear intent" of congress to subject the United States to all of the state court processes of an "adjudication" of its water rights with the sole exception of costs.

Pet. App. at 12a (emphasis in original). Congress' waiver of federal immunity is plainly and unambiguously apparent on the face of the McCarran Amendment.

The first sentence of the Amendment contains two separate waivers: consent to join the United States in suits for the adjudication of water rights, clause (1), and consent to join the United States in suits for the administration of water rights, clause (2).[12]

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[12] Clause (2) also makes reference to certain types of federal water rights: "water rights by appropriation under State law, by purchase, by exchange, or otherwise."

The United States argues that the Idaho Supreme Court mistakenly construed the joinder language in the first sentence as the complete federal waiver of immunity. Petition at 15. An accurate reading of the Idaho Supreme Court's opinion reveals that it was making a simple point; that Congress realized that merely consenting to joinder of the United States in an adjudication "suit" did not go far enough. Pet. App. at 11a. Such suits are highly specialized lawsuits which have very specialized procedures. As the Court has said:

> [W]ater rights adjudication is a virtually unique type of proceeding, and the McCarran Amendment is a virtually unique federal statute, and we cannot in this context be guided by general propositions.

Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 571 (1983). Further consent was needed from Congress, beyond simply joining the United States in such suits, to require the United States to comply with these special adjudication requirements. *See, e.g., Blatchford v. Native Village of Noatak*, 111 S. Ct. 2578, at 2585 n.4 (1991) (grant of federal question jurisdiction not sufficient to abrogate immunity for all federal questions). Thus, the Idaho Supreme Court recognized that the first sentence of the McCarran Amendment, allowing joinder of the United States in "any suit . . . for the adjudication of [water] rights," must be read together with the second sentence, which provides that "when a party to any such suit, [the United States] shall . . . be deemed to have waived *any* right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty." 43 U.S.C. § 666(a) (emphasis added). This

second sentence contains the critical waiver of sovereign immunity.

In *Hancock v. Train*, 426 U.S. 167 (1976), the Court noted the waiver in the Clean Air Act lacked all-inclusive language requiring federal installations to "comply with *all* . . . state . . . requirements," 426 U.S. at 182 (emphasis in original). In contrast, the second sentence of the McCarran Amendment does provide all-inclusive language by waiving "any" right to plead sovereign immunity from state laws governing adjudication procedures.[13]

The United States attempts to evade the all-inclusive waiver in the McCarran Amendment by arguing that the Amendment cannot plausibly waive immunity to the "unconventional" filing fees which "Idaho has only recently begun to impose." Pet. for Cert. at 15-16. The United States is only rearguing issues previously rejected by the Court. In *United States v. District Ct. for Water Div. No. 5*, 401 U.S. 527 (1971), upholding Colorado's adjudication statute, the Court rejected the following argument, very much like the one offered by the United States in the present case:

> It is emphasized, however, [by the United States] that the procedures under the new Act are much more burdensome on the Government

[13] The United States argues that the Idaho Supreme Court erred by finding the second sentence to be "a waiver of immunity to application of *all* state laws." Petition at 16 (emphasis added). The Idaho Supreme Court did *not* construe that phrase as a waiver of immunity from *all* state laws. The Idaho Supreme Court, in fact, rightly rejected that construction as implausible, along with the other alternate constructions proffered by the United States. Pet. App. at 11a-12a.

> than they were under the older Act. It is pointed out that the new statute contemplates monthly proceedings before a water referee on water rights applications. These proceedings it is argued, do not constitute general adjudications. . . .

Id., at 529. The Court, thus, affirmed that the McCarran Amendment does not preclude states from amending their adjudication procedures to meet changing circumstances and needs. As modern adjudications within Idaho grew more complex, and burdens upon individual claimants increased, it became apparent that the Idaho judiciary and IDWR would have to provide additional services to all claimants, including the United States to ensure efficient and timely resolution of adjudications. Accordingly, Idaho amended its adjudication procedures to assess filing fees that would allow provision of services designed to fulfill such needs. Such amendment of adjudication procedures is well within the scope of the McCarran Amendment.

The United States also argues that placement of the definite article "the" before "State laws" in the second sentence indicates that the waiver is limited to state laws governing acquisition of water rights by appropriation, as mentioned in the second clause of the first sentence.[14]

[14] The United States, in its Petition, changes the first sentence from the singular "appropriation under state law" to the plural when it rephrases it to: "the state laws governing 'acqui[sition of] water rights by appropriation.' " Petition at 16 (emphasis added). The obvious purpose of this rephrasing is to make the construction of the first sentence parallel "the state laws" used in the second sentence.

Petition at 16. Under this reading of the McCarran Amendment, the waiver in the second sentence only prevents the United States from pleading "sovereign immunity to excuse its failure to follow state law requirements in *acquiring water rights*, where the water rights are derived from state law rather than a federal reservation." Petition at 17 (emphasis in original). The United States insists that immunity to other state laws governing adjudication procedures must be separately stated. *Id.* Under this proposed interpretation, there is no waiver of immunity to suits for adjudication, only the bare consent to joinder found in clause 1 of the first sentence.

The United States' proposed interpretation of the McCarran Amendment would unduly restrict the Amendment, requiring Congress to separately waive immunity to each aspect of state adjudication laws. Fortunately, the Court has rejected the United States' argument in prior cases. The Court has consistently characterized the waiver in the McCarran Amendment as "all-inclusive." *United States v. District Ct. for Eagle County*, 401 U.S 520, 523 (1971); *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 810 (1976). Accordingly, in *United States v. District Ct. for Water Div. No. 5*, 401 U.S. 527 (1971), the Court found that the McCarran Amendment waived the United States' immunity to Colorado's new, and allegedly more burdensome, adjudication procedures. *Id.* at 529. Notably, the Court did not require that a separate waiver be obtained before such new procedures were applied to the United States.

In addition to its inconsistency with established precedent, the United States' proposed interpretation of the

McCarran Amendment is implausible. Use of the definite article "the" indicates that the term "state laws" refers to a particular set of laws, but does not necessarily imply the existence of an antecedent. The most logical reading of the second sentence is that the United States is to comply with the adjudication laws of the particular state bringing the general stream adjudication. The United States' arbitrary search for an antecedent in the first sentence violates common sense rules of construction, and, more importantly, violates the policy of compliance with adjudication procedures underlying the McCarran Amendment.[15]

The United States' proposed interpretation of the McCarran Amendment is nothing but a thinly-disguised recycling of arguments previously rejected by the Court. The Idaho Supreme Court correctly applied Court precedents in rejecting such implausible constructions of the McCarran Amendment.

The single exception to the general waiver of sovereign immunity in the McCarran Amendment forms the

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[15] The United States' interpretation of the McCarran Amendment also fails to make sense. Under the United States' interpretation, the waiver in the second sentence would only waive the United States' "immunity to excuse its failure to follow state law requirements in acquiring water rights. . . . " Pet. at 17. Such a waiver is unnecessary, since the United States could not acquire a water right based upon state law without following state law requirements. Secondly, if the United States voluntarily acquires a right under state law, it would have no reason to later claim immunity from that same state law in an adjudication.

heart of the United States' final argument. It states: "Provided, That no judgment for costs shall be entered against the United States in any suit." 43 U.S.C. § 666(a). The United States argues that the Idaho Supreme Court erred when it found that the plain meaning of "judgment for cost" is different from the "filing fees" required by Idaho Code § 42-1414. The United States urges that the only difference is the manner in which they are imposed, and they are actually the same assessments. Petition at 17. The United States is wrong both legally and factually.

The Idaho Supreme Court correctly determined the meaning of the term "judgment for costs" in accordance with its plain and well-defined meaning:

> It has long been recognized that "costs" is a term of known legal significance and differs from "fees." . . . "Costs" are a pecuniary allowance or a reimbursement made to the prevailing party in a lawsuit and are recoverable from the losing party. . . . In its usual and ordinary context, a fee is a charge for a privilege or a service under the control of the government.

Pet. App. at 13a-14a (citations omitted). The distinction between the plain meaning of the terms "costs" and "fees" described by the Idaho Supreme Court is correct and well recognized. 10 WRIGHT, MILLER AND KANE, FEDERAL PRACTICE AND PROCEDURE, § 2666 (1983) ("Costs, Fees, and Expenses Distinguished"), *cited in Library of Congress v. Shaw*, 478 U.S. 310, 321 (1986). The Court has recognized that "judgments for costs" have a very specific meaning: to reimburse a prevailing party the

costs of their litigation. *See, e.g., Ex Parte Peterson*, 253 U.S. 300, 314-319 (1920).[16]

Given the plain meaning of "judgment for costs," the filing fees required by Idaho Code § 42-1414 do not fall within this exception to the McCarran Amendment waiver. The filing fees do not involve the entry of a

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[16] The adjudication statutes in existence in 1952 distinguished between fees and costs. Filing fees were a substantial source of adjudication funding for some states. The United States implies that at the time of passage of the McCarran Amendment, other western states, including Senator McCarran's home state of Nevada, only funded their adjudications with judgments for cost. Petition at 6, n.1. This statement is a mischaracterization of the facts, and simply ignores that most state statutes at the time of enactment of the McCarran Amendment included provisions for either filing fees or apportionment of expenses, or both, as funding mechanisms for general adjudications. In fact, several states in 1952 provided for graduated filing fees analagous to the fees contested in this case. *See, e.g.*, Nevada Compiled Laws § 7914 (1929) (Idaho Exh. 252); Arizona Code of 1939 § 75-137 (Idaho Exh. 243); Act of March 6, 1947, ch. 88, § 2, 1947 Or. Laws 99, 100 (Amending Oregon Compiled Laws Annotated § 116-807) (Idaho Exh. 262).

The United States mischaracterizes the Arizona, Nevada and Oregon filing fees when it states that they were not judicial water rights proceedings. Petition at 18, n.10. Adjudications in those states started with significant quasi-judicial administrative investigations which narrowed the issues before the adjudication was finalized by judicial proceedings. Arizona Code of 1939 §§ 75-114 -127 (Idaho Exh. 243); Nevada Compiled Laws §§ 7905-7929 (1929; 1942 Supp.) (Idaho Exhs. 252, 253); Oregon Compiled Laws Annotated §§ 116-801 through 823 (1940) as amended by Act of March 6, 1947, ch. 88, § 2, 1947 Or. Laws 99, 100 (Idaho Exhs. 261, 262). The only distinction, which is not a significant difference, is that the judiciary did not take jurisdiction until after the administrative activities.

decree or order, but must accompany the initial filing of a notice of claim. Idaho Code § 42-1414. The fees bear no resemblance to a judgment for costs, since they are paid by all parties regardless of whether they "prevail" or not. Further, the fees are not used to reimburse claimants, but rather to fund the general services provided by IDWR to the benefit of all claimants, including the United States.

A lawsuit with over 120,000 claims involves a great logistical undertaking that far surpasses the administrative capability of most litigants. The IDWR's role reduces this administrative burden on all litigants, including the United States. The parties, including the United States, do not have to concern themselves with service of process on other potential claimants. They do not have to take and assemble the claims in a uniform format. They do not have to independently review the accuracy of each claim.[17] This is already done for them by IDWR, which has gathered the claims, examined the water system, investigated the claims based upon state law, abstracted the federal claims, and made its recommendations regarding how the claims are inter-related. Claimants, as a result, can focus their resources on those claims of critical importance to their individual situation. The practical consequence of IDWR's assistance in the SRBA is to make the SRBA a much simpler adjudicatory proceeding for all claimants, including the United States.

The benefit of the services provided to claimants from filing fee revenues cannot be reasonably questioned.

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[17] Of course, a claimant may review very closely a competing claim to water of another party. But this review would not extend to all claims.

The district court, after reviewing the factual evidence, concluded:

> The filing fee is a reasonable charge assessable upon an "identifiable recipient[18] for a measurable unit or amount of government service or property from which he derives special benefit." *Federal Power Commission v. New England Power Company* 415 U.S. 345, 349, 94 S. Ct. 1151, 1154 (1974). The ultimate beneficiary, the United States, is well served by having its water rights administered and adjudicated.

Pet. App. at 111a-112a.

The district court's conclusion is in accordance with Supreme Court precedents holding that graduated fees can be legitimately charged to claimants in general adjudications to pay for the same types of services provided by the Idaho Department of Water Resources in this case. "That these services are beneficial to the claimant and necessary to the preservation of his rights in the stream and the protection and assurance of his title goes without saying." *Pacific Live Stock Co. v. Lewis*, 241 U.S. 440, 452, (1916), quoting *Pacific Livestock Co. v. Cochran*, 144 Pac. 668, 672 (Ore. 1914).

2. The issue in this case is limited to whether the plain language of the McCarran Amendment allows states to impose filing fees on the United States in general adjudications to pay for the special services provided by states in those adjudications. Despite the United States' participation in numerous water rights adjudications

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[18] Petitioner's Appendix at 111a mistakenly reprinted this word as "receipt."

requiring some type of filing fee, litigation challenging such fees has been extremely limited. The consistent practice of the United States has been to defer to state filing fee requirements. The United States has paid filing fees in general adjudications in the states of Arizona, California, Colorado, Idaho, Montana, Nevada, and Oregon.[19] Rec. Vol. I, 57-58, 92-106, 150-153, 158-160, 195.[20] In some cases, the fees amounted to several hundred thousand dollars.[21]

The United States has rarely chosen to challenge the imposition of adjudication filing fees. In fact, Idaho is only aware of two reported decisions construing whether the Amendment allows the imposition of fees against the United States. *United States v. Oregon Water Resources*

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[19] The United States has paid some of these fees under protest. Idaho Exh. 193.

[20] Congress recognizes that the acquisition of water rights by the United States, including their proof in court, requires funding. Congress has authorized that funding. For example, 16 U.S.C. § 1d (1988), provides that "[o]n and after August 8, 1953 applicable appropriations of the National Park Service shall be available for the objects and purposes specified in section 17j-2 of this title." Section 17j-2 of Title 16, U.S. Code, authorizes appropriations for the investigation, establishment, and acquisition of water rights in accordance with "local custom, law, and decision of courts. . . . "

A similar provision applies to the U.S. Forest Service. 16 U.S.C. § 526 (1988). The Reclamation Act of 1902, ch. 1093, 32 Stat. 388, also requires compliance with state water law for Bureau of Reclamation projects. Idaho argued in the courts below that these statutes provide an independent basis for payment of the filing fees.

[21] The total fees paid by the United States in Arizona adjudications is approximately $320,000. Rec. Vol. III, 610.

Dep't, 774 F. Supp. 1568 (D. Ore. 1991) (United States must pay filing fees); and *In re the General Adjudication of all Rights to Use Water on the Big Horn River Sys.*, 753 P.2d 76 (Wyo. 1988), *aff'd by an equally divided court*, 492 U.S. 406 (1989) (United States must pay its share of fees of special master). In both cases, the decisions were consistent with the Idaho Supreme Court decision.

In another case, rather than appeal a Colorado district court's decision requiring the United States to pay fees, the United States agreed to pay the filing fees. *United States v. City & County of Denver*, 656 P.2d 1, 15 & 20-21 n.33 (Colo. 1983).[22]

The United States' routine payment of filing fees in other adjudications belies the United States' assertion that assessment of such fees is an important and reoccurring issue of federal sovereignty. Indeed, past payment of fees indicates that the United States has acted in accordance with the very interpretation of the McCarran Amendment that it now challenges. The United States' past actions indicate that the actual purpose of the United States' petition is to seek a judicial amendment of the McCarran Amendment. Concerns about the need to amend the McCarran Amendment are more properly addressed in Congress, however, and should not be brought before this Court.

Indeed, the only reason for the United States to raise the issue at this late date is because the SRBA will involve approximately 30,000 federal claims, resulting in larger

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[22] The lower court's decision can be reviewed in the record. Rec. Vol. I, 31-33.

fees than in past adjudications. Although the dollar amount at issue in this case appears substantial, the issue of adjudication filing fees has not been of great concern to the United States in the past. Nor does the issue of adjudication filing fees raise concerns regarding federal-state relations in general. Due to the limited application of the McCarran Amendment, and the unique size and scope of the federal claims in this case, the issues raised by the United States regarding filing fees are unlikely to arise in future cases. The mere fact that the unique circumstances of this case will result in cumulative filing fees more substantial than in past cases does not elevate this issue to a level requiring Supreme Court review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IDAHO CODE, CHAPTER 14
ADJUDICATION OF WATER RIGHTS

SECTION.

42-1401. Legislative intent.
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42-1404. Private actions for adjudication of water rights.
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42-1416A.	Prior change in point of diversion, place of use, period of use, or nature of use of water right claimed in a general adjudication.
42-1416B.	Claim for expanded use in critical ground water area – Determination of water availability.
42-1417.	General adjudication – Interim administration of water rights.
42-1418.	Appeals.
42-1419.	Entry of an order commencing a general adjudication on a special docket – Constructive notice – Filing of certified copy of order in other counties.
42-1420.	Binding effect of decree – Exceptions.
42-1421.	Procedures for adjudication of unperfected water rights initiated under state law – Director's jurisdiction.
42-1422.	Special master – Appointment – Powers and duties – Compensation – Disqualification – Review of special master's report.
42-1423.	Severability.

42-1401. Legislative intent. – The legislature finds and declares that the state laws and procedures for the adjudication of rights to the use of water need to be modified:

(1) to provide a statutory procedure for incorporating a negotiated agreement between a federal reserved water right claimant and the state of Idaho into an adjudication;

(2) to provide a more efficient method for adjudications;

(3) to assure that state laws and procedures provide a fair and impartial forum for the adjudication of the rights of all claimants; and

(4) to assure that state laws and procedures are adequate as a matter of federal law to adjudicate the water rights of all federal reserved water right claimants. [I.C., § 42-1401, as added by 1986, ch. 220, § 2, p. 558.]

42-1401A. Definitions. – The following terms are defined for purposes of this chapter as follows:

(1) "Claimant" means any person asserting ownership of rights to the use of water within the state of Idaho or on whose behalf ownership of rights to the use of water is asserted.

(2) "Consumptive use" means the amount of water that does not remain in the water system after use or is not returned to the water system through return flows or seepage, whether or not treatment for purposes of maintaining water quality is required before the water may be returned to the water system. "Consumptive use" for an irrigation water right shall be based upon the most water consumptive crop that can be grown in the area during the period of the year when water is used for irrigation. "Consumptive use" is included as a rebuttable presumption in a decree only for the purpose of transfers pursuant to section 42-222, Idaho Code.

(3) "Department" means the Idaho department of water resources.

(4) "Director" means the director of the Idaho department of water resources.

(5) "Domestic use" is defined in section 42-111, Idaho Code.

(6) "General adjudication" means an action for the judicial determination of the extent and priority of the rights of all persons to use water from any water system within the state of Idaho that binds all persons, including

unknown parties, except as provided in section 42-1420, Idaho Code.

(7) "Party" means the director, any person who is a claimant, or any person who is served or joined.

(8) "Person" means an individual, a partnership, a trust, an estate, a corporation, a municipal corporation, the state of Idaho or any political subdivision, the United States, an Indian tribe, or any other public or private entity.

(9) "Private adjudication" means an action commenced in accordance with section 42-1404, Idaho Code, for the judicial determination of the extent and priority of the rights of named parties to the use of water from any water system within the state of Idaho, for which a general adjudication has not been commenced or completed, that binds only those persons joined as parties.

(10) "Purchaser" means any successor in interest of a claimant, whether the interest is acquired by purchase, gift, inheritance, or other means.

(11) "Supplemental adjudication" means an action commenced in accordance with section 42-1405, Idaho Code, for the judicial determination of the extent and priority of the rights of the plaintiff(s) to the use of water from any water system within the state of Idaho which has been adjudicated in a general adjudication or in a private adjudication.

(12) "Stock watering use" means the use of water solely for livestock or wildlife where the total use is not in excess of thirteen thousand (13,000) gallons per day.

(13) "Water system" includes all rivers, streams, lakes, springs, ground waters, or other sources within this state, including all water subject to claims based

upon federal law, including any river system or other source, as used in 43 U.S.C. section 666. [I.C., § 42-1401A, as added by 1986, ch. 220, § 3, p. 558 and ch. 234, § 1, p. 645; am. 1990, ch. 319, § 6, p. 870.]

42-1402. Decreed rights appurtenant to land – Federal reserved water rights excepted. – In allotting the waters of any water system by the district court according to the rights and priorities of those using such waters, such allotment shall be made to the use to which such water is beneficially applied, except where federal reserved water rights are involved, in which case the allotment shall be made in accordance with federal law. The right confirmed by such decree or allotment shall be appurtenant to and shall become a part of the land on which the water is used, and such right will pass with the conveyance of such land, and such decree shall describe the land to which such water shall become so appurtenant, except in the case of a federal reserved water right. The amount of water so allotted shall never be in excess of the amount actually used for beneficial purposes for which such right is claimed, or in the case of a federal reserved water right, in excess of the amount determined by federal law. [1903, p. 223, § 38; reen. R.C., § 4621; am. 1913, ch. 35, § 1, p. 133; C.L., § 4621; C.S., § 7033; I.C.A., § 41-1302; am. 1969, ch. 279, § 2, p. 822; am. 1986, ch. 220, § 4, p. 558.]

ANALYSIS

42-1403. Certified copies of allotments. – It shall be the duty of the clerk of the district court in each of the counties of this state to prepare at the expense of the

county, and transmit without delay to the department of water resources by express or registered mail, a certified copy of the allotments of the various streams, made by the district court and now on file in the offices of the district court in the various counties of the state: provided, that said clerk may, in place of such transcript, transmit such original records of such decrees as are recorded in books kept for that purpose. Immediately upon receipt of said transcripts or said original records, it shall be the duty of the department to record them in a book kept for that purpose, and to classify and arrange said decrees by placing all the rights to water of one stream and its tributaries together, and the department shall send to each water commissioner a certified copy of the allotments made by the district court of all the streams within his district. And when an allotment of the waters of a stream shall be made by the district court, the clerk of such district court shall immediately prepare, at the expense of the county, and transmit to the department of water resources, a certified copy of the decree allotting such waters. [1903, p. 223, § 39; reen. R.C. & C.L., § 4622; C.S., § 7034; I.C.A., § 41-1303.]

42-1404. Private actions for adjudication of water rights. – (1) Any claimant may file suit in the district court for the county in which the point of diversion or place of use of the claimed right is located for the purpose of adjudicating rights to the use of water from any water system for which a general adjudication has not been commenced or completed. The claimant shall name as defendants the director and all claimants of rights to the use of water from the water system whose joinder is necessary to resolve the dispute over rights to the use of

water from the water system. The claimant shall also publish notice of the action in the manner specified in subsection (2)(b) of section 42-1408A, Idaho Code.

(2) If the director determines that the public interest and necessity will be served by a general adjudication of water rights, the director may submit a counterclaim in the form of a petition to the court for an order commencing a general adjudication and the adjudication shall proceed in the manner specified in sections 42-1406 and 42-1407 through 42-1423, Idaho Code.

(3) If the director determines that the public interest and necessity will not be served by a general adjudication of water rights, the action may proceed as described in subsections (4) through (7) of this section as an adjudication of the rights of all persons joined pursuant to subsection (1) of this section.

(4) Any claimant of a right to the use of water from the water system shall be entitled to intervene and have his or her right adjudicated. The court may request a report of the director, as described in section 42-1411, Idaho Code, as to those rights to be determined, in which case the director shall commence an examination of the water system in accordance with the provisions of section 42-1410, Idaho Code.

(5) The director shall provide to the court an estimate of the costs that will be incurred in conducting the examination and in preparing the report and an approximate time when the report will be completed. The court shall order the claimants of the rights to be determined to submit a notice of claim to the director in accordance with section 42-1409, Idaho Code, except that the fee as described in section 42-1414, Idaho Code, shall not apply.

Upon the completion of claims-taking, the director shall bill each claimant for a claim fee equal to that claimant's proportionate share of the total estimated cost to the state relative to that claimant's share of the total amount of water claimed by all claimants or for an amount as determined by the court. Any notice of claim for a water right for which the fee is unpaid after thirty (30) days from billing by the director shall be incomplete and may be rejected by the director. Prior to filing of the report with the court, the claimants shall pay the balance of the department's verified costs or be refunded any unused estimated costs advanced to the department in the same proportion as described above. In the event that a claimant shall contest the department's costs, the court shall then determine the reasonable costs to be paid by each claimant.

(6) Notice of the filing of the report shall be given and objections to the report shall be made and heard as provided in sections 42-1411 and 42-1412, Idaho Code. The adjudication shall otherwise proceed in accordance with the Idaho rules of civil procedure. The decree shall contain or incorporate a statement of each element of a water right as stated in subsections (2) and (3) of section 42-1411, Idaho Code, as applicable. The decree shall also determine all other matters necessary for the efficient administration of the water rights. The decree shall be conclusive as to the rights determined in the proceeding only as to those persons party to the proceeding.

(7) Any party aggrieved by the decree of the district court may appeal in accordance with the Idaho appellate rules. [I.C., § 42-1404, as added by 1986, ch. 220, § 5, p. 558.]

42-1405. Summary supplemental adjudication of water rights. – (1) Where an adjudication of a water system has been commenced prior to July 1, 1986, or where an adjudication of a water system has been commenced pursuant to subsection (3) of section 42-1404, Idaho Code, resulting in a decree of any court of competent jurisdiction, and thereafter it appears that any claimant having the right to the use of any part of those waters was not included in the decree as a party, and the right was not determined thereby, or that a claimant subsequent to the decree has acquired any right to the use of those waters, the claimant may bring an action to have such right adjudicated in the manner specified in subsection (3) of this section.

(2) Where a general adjudication of a water system has been commenced or enlarged after July 1, 1986, pursuant to sections 42-1406 or 42-1406A, Idaho Code, resulting in a decree of any court of competent jurisdiction, and thereafter, it appears that a claimant subsequent to the decree has acquired any right to the use of those waters, or that a claimant who possesses a water right designated in paragraphs (a) through (d) of subsection (1) of section 42-1420, Idaho Code, did not have those water rights determined, the claimant may bring an action to have those water rights adjudicated in the manner specified in subsection (3) of this section.

(3) The following procedure shall be used for any supplemental adjudication:

(a) Claimant may bring an action in the district court of the county wherein the point of diversion or place of use of the claimed right is located against the watermaster having charge of the distribution of the water source in which the claimant asserts an interest, or if there be no

watermaster thereof, then against the director, provided that if the action is brought against the watermaster notice thereof shall be mailed by certified mail by the filing party to the director, at the time of service upon the watermaster; and

(b) The claimant shall, in his complaint, set forth his acceptance as binding upon him of all prior applicable decrees and the findings of fact and conclusions of law upon which they are based, shall request the commencement of a supplemental adjudication and shall set forth the claimed water right in a notice of claim form furnished by the director and attached to the complaint. Thereupon, the district court shall issue a summons [cause] and it shall be served upon the defendant; and

(c) After return of service of summons, the claimant shall cause to be published once a week for not less than three (3) weeks, a notice of the pendency and purpose of the action in such newspaper or newspapers as the judge of the district court may order, which notice shall contain the title of the court and the cause, the name and post-office address of the plaintiff, the date of priority of the water right claimed, the source of the water supply, the amount of water claimed, in general the nature of the water use, the approximate location of the point of diversion, and the place of use; and

(d) Any person who may be injured and who objects to the water right claimed by the plaintiff, as described in the published notice, shall, within forty-five (45) days of the date of the first publication of notice, file with the district court written notice of such objection stating the reasons for the objection. A copy of the objection shall be served upon the plaintiff, the watermasters, the director and upon all other parties of record in the action; and

(e) The director, within thirty (30) days after the expiration of the time fixed to file an objection with the court, shall file with the court notification as to whether the director will conduct an examination of the water rights

claimed in the complaint and whether the director [department] will prepare for submittal to the court a report as described in section 42-1411, Idaho Code, as applicable. The director may commence an examination of the water system in accordance with the provisions of section 42-1410, Idaho Code. Notification to the court that a report will be prepared shall include an approximation of the time when the report will be completed, and an estimate of the director's costs that will be incurred in conducting the examination and in preparing the report. Plaintiff shall then be required to advance to the director, the estimated costs to be incurred by the director in conducting the examination and in preparing the report. Prior to the filing of the report with the court, the plaintiff shall pay the balance of the director's verified costs or be refunded any unused estimated costs advanced to the director. In the event that the claimant shall contest the director's costs, the court shall then determine the reasonable costs to be paid by the claimant; and

(f) The director shall file the report with the court upon completion and shall send a copy thereof to all parties to the action. Objections to the report of the director and hearing upon the objections shall be in accordance with the provisions of section 42-1412, Idaho Code; and

(g) For those cases in which the director notifies the district court that the director does not intend to prepare a report, the cause may thereafter be brought on for hearing in open court, and any party having filed a timely objection with the court may appear and defend against the claim; provided that the court in such a case may, upon motion and good cause shown, order the director to prepare a report in accordance with subsections (3)(e) and (3)(f) hereof.

(4) The court's decree shall determine the rights of the plaintiff in accordance with the proof submitted but subject to the terms of the original decree or decrees. The decree shall contain or incorporate a statement of each

element of a water right as stated in subsections (2) and (3) of section 42-1411, Idaho Code, as applicable, except that a decree for any adjudication commenced prior to July 1, 1986, need not contain a determination of the annual volume of consumptive use. The decree shall also determine all other matters necessary for the efficient administration of the water rights. Whereupon water shall be distributed to the claimant in accordance therewith and in the same manner as though the claimant's right had been included in the decree or decrees.

(5) Any party to said action may appeal in accordance with the Idaho appellate rules from the decree entered in the action hereby authorized to be brought. [1911, ch. 224, § 1, p. 708; am. 1915, ch. 34, § 18, p. 112; reen. C.L., § 4623a; C.S., § 7036; I.C.A., § 41-1305; am. 1981, ch. 265, § 3, p. 561; am. 1986, ch. 220, § 6, p. 558; am. 1986, ch. 230, § 1, p. 621.]

42-1405a. Construction of §§ 42-1404 and 42-1406. – The provisions of subsection (2) of section 42-1404, Idaho Code, and subsections (1) and (2) of section 42-1406, Idaho Code, shall not be used to commence the general adjudication authorized by section 42-1406A, Idaho Code. [1986, ch. 220, § 29, p. 558.]

42-1406. General adjudication – Public interest. – (1) Upon petition signed by five (5) or more or a majority of the users of water from any water system requesting a determination of the rights of the various claimants of water from that system, if the director deems that the public interest and necessity will be served by a determination of the water rights of that water system, the director shall petition the court for an order commencing

a general adjudication of the rights of the claimants from the water system, in accordance with sections 42-1407 and 42-1408, Idaho Code.

(2) If the director deems that the public interest and necessity will be served by a determination of the water rights of any water system, the director, upon his own initiative, may file a petition for entry of an order commencing a general adjudication. [I.C., § 42-1406, as added by 1969, ch. 279, § 4, p. 822; am. 1986, ch. 220, § 7, p. 558.]

42-1406A. Snake River basin adjudication – Commencement. – (1) Effective management in the public interest of the waters of the Snake River basin requires that a comprehensive determination of the nature, extent and priority of the rights of all users of surface and ground water from that system be determined. Therefore, the director of the department of water resources shall petition the district court to commence an adjudication within the terms of the McCarran amendment, 43 U.S.C. section 666, of the water rights of the Snake River basin either through initiation of a new proceeding or the enlargement of an ongoing adjudication proceeding. The petition shall describe:

(a) The boundaries of the system within the state to be adjudicated;

(b) Any class of water users within the system and the boundaries of any hydrologic sub-basins within the system for which the director intends to proceed separately with respect to the actions required or authorized to be taken pursuant to sections 42-1408 through 42-1414, Idaho Code; and

(c) The uses of water, if any, within the system that are recommended to be excluded from the adjudication proceeding.

(2) Upon issuance of an order by the district court which:

(a) Authorizes the director to commence an investigation and determination of the various water rights to be adjudicated within the system;

(b) Defines the boundaries of the system within the state to be adjudicated;

(c) Defines the classes of water users within the system and the boundaries of any hydrologic sub-basins within the system for which proceedings may advance separately pursuant to sections 42-1408 through 42-1414, Idaho Code; and

(d) Defines any uses of water excluded from the adjudication proceedings; the adjudication shall proceed in the manner provided under the provisions of chapter 14, title 42, Idaho Code, with the exception of sections 42-1406 and 42-1407, Idaho Code.

(3) In exercising his authority under subsection (1) of this section, the director of the department of water resources:

(a) Shall petition the district court to commence an adjudication of the water rights of all of the Snake River basin within the state of Idaho upstream from the point at which the Snake River leaves the state of Idaho and enters the state of Oregon in section 14, township 4 north, range 6 west, Boise Meridian;

(b) May petition the district court to commence an adjudication of the water rights of the main stem of the Snake River which forms the boundary between the state of Idaho and the states of Oregon and Washington. The director may include within his petition under this paragraph any unadjudicated tributaries. The director shall not include in the petition filed under this paragraph any adjudicated tributary unless the United States, or other parties whose consent is necessary, refuse to consent to the jurisdiction of the district court to adjudicate all

federal or Indian water rights claims pursuant to the McCarran amendment, 43 U.S.C. section 666. [I.C., § 42-1406A, as added by 1985, ch. 18, § 1, p. 27; am. 1985, ch. 118, § 1, p. 286.]

42-1407. General adjudication – Contents of petition. – (1) A petition for a general adjudication shall contain among other things, the following:

(a) a description of the proposed boundaries of the water system to be adjudicated;

(b) a statement of why the public interest and necessity would be served by a general adjudication;

(c) a list of counties where the water system proposed to be adjudicated is located and a designation of whether all or only a portion of the county is included within the boundaries of the proposed general adjudication;

(d) a description of the general method proposed to ascertain and to serve claimants not disclosed following completion of the service required by paragraphs (a) through (d) of subsection (2) of section 42-1408A, Idaho Code; and

(e) a prayer for relief requesting the district court to enter an order that commences the general adjudication.

(2) A petition for entry of an order commencing a general adjudication shall be captioned: "In Re the General Adjudication of Rights to the Use of Water From the ___ Water System.". [I.C., § 42-1407, as added by 1986, ch. 220, § 8, p. 558.]

42-1408. General adjudication – Venue – Notice of filing – Commencement order. – (1) A general adjudication shall be brought in any district court in which any part of the water system within the state of Idaho is located. The clerk of the district court in which the petition is filed shall send to the supreme court a true and certified copy of the petition. The supreme court, by order, shall assign the judge to preside over the general

adjudication. Venue of the general adjudication shall be determined by order or rule of the supreme court and venue of hearings under the general adjudication shall be determined by order of the presiding judge.

(2) The director shall prepare, in plain and concise language, and publish a notice of filing of a petition for entry of an order commencing a general adjudication for three (3) consecutive weeks in a newspaper of general circulation published in each county in which any part of the water system proposed to be adjudicated is located. If there is no newspaper published within a county, then the notice shall be published in a newspaper having general circulation in that county. The date set for hearing on the petition shall not be less than twenty (20) days after the last date of publication. The director shall serve the notice of filing a petition on the United States and on the state of Idaho. The director shall file affidavit(s) of service of the notice of filing with the district court upon completion of service.

(3) The notice of filing shall contain:

(a) a description of the boundaries of the water system proposed for the general adjudication;

(b) a statement of the date, place, and time of hearing before the district court;

(c) a concise statement of the matters proposed to be considered before the district court; and

(d) a statement that the district court will hear evidence and legal argument from any person in response to any matter raised by the petition.

(4) With respect to a general adjudication commenced pursuant to section 42-1406, Idaho Code, if the district court determines that the public interest and necessity will be served by a general adjudication, the district court shall enter an order that includes the following:

(a) a provision that commences the general adjudication;

(b) a description of the boundaries of the water system for which a general adjudication is commenced;

(c) a list of counties where the water system to be adjudicated is located and a designation of whether all or only a portion of the county is included within the boundaries of the general adjudication;

(d) a provision that requires all claimants to file a notice of claim or negotiated agreement for all water rights from the water system, except that the court may exclude those types of water rights designated in paragraph (a) of subsection (1) of section 42-1420, Idaho Code;

(e) a determination of the method of service for claimants not disclosed following completion of the service required by paragraphs (a) through (d) of subsection (2) of section 42-1408A, Idaho Code; and

(f) a statement that the files of the district court will contain affidavits of service and other documents stating the persons served with a copy of the notice of order commencing the general adjudication.

(5) Promptly upon entry of the commencement order, the clerk of the district court shall send a certified copy of the order to the director, and shall serve notice of entry of the order on all persons appearing before the court in accordance with the Idaho rules of civil procedure, except that the director may prepare and provide to the clerk, sufficient copies of a notice of entry of the order for service. [I.C., § 42-1408, as added by 1986, ch. 220, § 9, p. 558.]

42-1408A. Service of notice of order commencing a general adjudication. – (1) Upon entry of a district court's order commencing a general adjudication, the director shall prepare a notice of order, using plain and

concise language, that contains the following information or enclosures:

(a) an order commencing a general adjudication has been entered, the date of entry of the order, and the district court that entered the order;

(b) an illustration of the boundaries of the water system to be adjudicated;

(c) that section 42-1409, Idaho Code, requires in a general adjudication all claimants, except as specifically excluded by law, to file for each water right, a notice of claim on a form furnished by the director; failure to file a required notice of claim will result in a court determination that no water right exists for the use of water for which the required notice of claim was not filed;

(d) a notice of claim is required for any water right license and for any water right permit on file for which the director requires a permit holder to file a notice of claim in accordance with section 42-1409, Idaho Code; a notice of claim may be filed for any other water right permit;

(e) a notice of claim is not required for a water right evidenced by an application on file with the department;

(f) a notice of claim, if the court order excludes any uses from an adjudication, may be filed for the excluded use prior to the filing of the director's report with the district court and the right will be determined, even though a notice of claim is not required;

(g) a notice of claim is not required for any person who receives water solely by virtue of ownership of shares of stock in, or by being located within the boundaries of, a water delivery organization, if the water delivery organization holds legal title to the water right and if the water delivery organization files a notice of claim;

(h) the date set by the director for filing a timely notice of claim, which shall not be less than ninety (90) days after service;

(i) the locations at which the notice of claim forms will be available and at which a reasonably detailed map of the boundaries of the water system will be posted;

(j) section 42-1414, Idaho Code, requires each claimant, other than those exempted by federal law, to pay a variable fee with a notice of claim; failure to pay the fee will result in rejection of the notice of claim; failure to file a timely notice of claim will result in the assessment of a late fee in the amount of fifty dollars ($50.00) or fifteen per cent (15%) of the original filing fee, whichever is greater;

(k) section 42-1409, Idaho Code, requires that all purchasers of a water right inquire of the director whether a notice of claim has been filed, and if not, to file a notice of claim, except as specifically excluded by law, and that all claimants and purchasers provide the director written notice of any change in ownership, along with some evidence of ownership or of any change in mailing address; and

(l) the files of the district court will contain affidavits of service or other documents stating the persons served with a copy of the notice of order.

(2) The director shall serve copies of the notice of order on the parties to the general adjudication as follows:

(a) the director shall serve the notice of order on the state of Idaho and the United States;

(b) the director shall serve the notice of order on claimants other than the persons in paragraph (a) of subsection (2) of this section, initially by publication once a week for three (3) consecutive weeks in a newspaper of general circulation published in each county in which any part of the water system, which is the subject of the general adjudication, is located. If there is no newspaper published within a county, then the copies shall be published in a newspaper having general circulation in that county;

(c) the director shall post the notice of order in each county courthouse, county recorder's office, and county assessor's office in which any part of the water system is located. The director shall complete the posting on or before the date of the last publication within each county;
(d) the director shall serve the notice of order by ordinary mail on each person listed as owning real property on the real property assessment roll within the boundaries of the water system to be adjudicated at the address listed on the real property assessment roll; and
(e) the director shall file a copy of the notice of order commencing a general adjudication in the office of the county recorder in each county in which any part of the water system is located; notwithstanding the provisions of section 5-505, Idaho Code, the notice, from the time it is filed with the recorder for record, is constructive notice of the contents thereof within the county in which the notice is recorded, to subsequent purchasers and mortgagees.

(3) The director shall send the notice of order by ordinary mail to all persons who submit a written request to the director to be notified of the commencement of an adjudication. The director may circulate copies in any additional manner the director deems appropriate.

(4) Upon expiration of the period for filing notices of claims, the director shall compare the notices of claims with department records and other information reasonably available to determine whether there are any rights to water from the water system for which no notice of claim was filed. In the event the director determines that not all claimants have filed claims, the director shall make a reasonably diligent effort in accordance with the court order to determine the land to which the possible claim is appurtenant, the last known owner of that land, and the last known address of that owner. The director

shall serve a notice of order on the last known owner in accordance with the court order. The notice shall contain the information specified in subsection (1) of this section, except that the notice shall state the additional period of time, in no case less than thirty (30) days from the date the notice is served, in which the notice of claim must be received by the director.

(5) The director shall file with the district court such proof of service as may be required to demonstrate compliance with the above requirements. [I.C., § 42-1408A, as added by 1986, ch. 220, § 10, p. 558 and 1986, ch. 230, § 2, p. 621; am. 1991, ch. 84, § 1; p. 188.]

42-1409. Notice of claim. – (1) The director shall prepare and furnish at no cost two (2) standard notice of claim forms. One (1) notice of claim form shall be for use by any claimant claiming a water right acquired under state law. The other notice of claim form shall be for use by any claimant claiming a water right reserved under federal law, unless the state of Idaho and the federal reserved water rights claimant have described the water right in a negotiated agreement and have submitted a copy of that agreement to the director.

(2) The notice of claim form for use by any claimant who claims a water right acquired under state law shall include the following:
(a) the name and address of the claimant;
(b) the source of water;
(c) the quantity of water claimed to be used in cubic feet per second or the quantity of water stored in acre-feet per year;
(d) the date of priority claimed from any license, permit, or decree; or if the right is not based upon a license,

permit, or decree, then the date when the water was first applied to beneficial use;

(e) the number thereof, if founded upon a right on file with the department; or if the right is founded upon judicial decree not on file with the department, then the title of the court and cause, number of the action and the date of entry;

(f) the legal description of the point of diversion; if the claim is for an instream flow, then a legal description of the beginning and ending points of the claimed instream flow;

(g) the purpose(s) of use and the period of the year when water is used for each purpose;

(h) a legal description of the place of use; if one (1) of the purposes of use is irrigation, then the number of irrigated acres within each forty (40) acre subdivision, except as provided in section 42-219, Idaho Code;

(i) the dates of any changes or enlargements in use, including the dimension of the diversion works as originally constructed and as enlarged;

(j) the annual volume of consumptive use; and

(k) such other facts as the director may require to show the extent and nature of the right and to show compliance with the law in acquiring the right claimed.

(3) The other notice of claim form shall be for use by any claimant who claims a water right reserved under federal law, unless the state of Idaho and the federal reserved water rights claimant have described the water right in a negotiated agreement and have submitted a copy of that agreement to the director. The notice of claim form shall include the following, as applicable:

(a) the name and address of the claimant;

(b) the source of water;

(c) the total quantity of water claimed to be reserved for each and every purpose, including all present and future uses;

(d) the date of priority claimed;

(e) the legal description of existing point(s) of diversion; if the claim is for an instream flow, then a legal description of the beginning and ending points of the claimed instream flow;

(f) the purpose(s) for which the water included in the claim is presently being used, if at all;

(g) the period of the year when water is necessary for the designated purposes;

(h) a legal description of the reservation;

(i) a map designating for each consumptive use the existing or proposed place of use;

(j) the annual volume of consumptive use;

(k) a list of document(s) creating the federal reservation; and

(l) such other facts as the court may required to define the right in accordance with federal law.

(4) A claimant may amend a notice of claim form at any time prior to the filing of the director's report required by section 42-1411, Idaho Code. With respect to any water right for which a change was approved by the director pursuant to sections 42-211 or 42-222, Idaho Code, after filing the notice of claim and prior to filing of the director's report, the claimant shall amend the notice of claim consistent with the determination of the director on the change. If a claimant increases in an amended notice of claim the amount of water claimed, the amount of land irrigated or the kilowatt capacity of the generating facility, the claimant shall pay upon filing the amended notice of claim an additional variable fee in accordance with the rates set forth in section 42-1414, Idaho Code. Claimants shall be entitled to return of filing fees or late fees only where the fee was miscalculated at

the time the original or amended notice of claim was filed.

(5) Each claimant shall sign and verify under oath that the statements contained in a notice of claim or amended notice of claim are true and correct.

(6) All claimants of water rights that are included in a general adjudication shall file with the director a notice of claim or negotiated agreement of federal reserved water rights for all water rights, except for those types of water rights designated in paragraphs (a) through (d) of subsection (1) of section 42-1420, Idaho Code. Any claimant may file a notice of claim or negotiated agreement for any water right designated in paragraphs (a) through (d) of subsection (1) of section 42-1420, Idaho Code, at any time before the director's report is filed with the district court. Any person who fails to submit a required notice of claim or negotiated agreement shall be deemed to have been constructively served with notice of a general adjudication by publication and mailing as required by section 42-1408A, Idaho Code.

(7) Each purchaser of a water right from the water system shall inquire of the director whether a notice of claim has been filed, and if not, shall file a notice of claim in accordance with this section. All claimants and purchasers shall provide the director written notice of any change in ownership or of any change in mailing address during the pendency of a general adjudication. All purchasers shall submit some evidence of ownership along with the notice of change of ownership.

(8) If a claimant files a notice of claim after the date set by the director in the notice mailed or served in accordance with subsections (2), (3), or (4) of section

42-1408A, Idaho Code, or with subsection (9) of this section; the claimant shall pay the fee set forth in section 42-1414, Idaho Code, and in addition, the amount of fifty dollars ($50.00) or fifteen per cent (15%) of the original filing fee, whichever is greater. The district court or the director may waive the late processing fee or a portion thereof for good cause.

(9) At least one hundred twenty (120) days prior to filing of the director's report with the court, the director may notify each holder of a permit or license to appropriate water from the water system, for which proof of beneficial use was filed after entry of the court's order commencing a general adjudication, to file a notice of claim within ninety (90) days of mailing of the notice. The director shall notify the holder of the permit or license by certified mail at the most recent address shown in the records of the department.

(10) The district court or director may extend the time for filing a notice of claim. [I.C., § 42-1409, as added by 1986, ch. 220, § 11, p. 558.]

42-1410. Examination of water system and of claims. – (1) Upon entry of the court's order commencing a general adjudication, or as required in sections 42-1404 or 42-1405, Idaho Code, the director shall commence an examination of the water system, the canals and ditches and other works, and the uses being made of water diverted from the water system. The examination shall continue for such a period of time as is necessary to evaluate the extent and nature of each water right for which a notice of claim has been filed. The director may conduct any fact-finding hearing necessary for a full and adequate disclosure of the facts.

(2) The director and other employees of the department shall have authority to go upon all lands, both public and private, for the purpose of investigating the uses of water from any water source and may require the cooperation of the claimant in investigating the claimant's water use. The employee investigating the claimant's use shall make a reasonable effort to contact the claimant to schedule a date and approximate time for the examination. If the well or diversion works are located in a building other than an unlocked structure used solely for housing the well or other diversion works in which there is no reasonable expectation of privacy, the employee shall only enter the building in the absence of a court order after requesting and receiving the permission of the claimant or other occupant. The director may request the district court to issue an order compelling inspection and subpoenas requiring the attendance of any witness or the production of documents in accordance with the Idaho rules of civil procedure.

(3) The provisions of subsections (1) and (2) of this section shall not apply to federally recognized Indian reservations unless pursuant to court order or tribal consent.

(4) The director shall prepare a map or maps of the water system to be adjudicated in such detail as the director deems appropriate to assist the claimants in preparing notices of claims and objections to the director's report.

(5) Any maps prepared by the director pursuant to subsection (4) of this section shall be available for inspection at the offices of the department and any other locations the director may designate, for the purpose of

assisting any claimant in preparing and filing claims and objections to the director's report. [I.C. § 42-1410, as added by 1986, ch. 220, § 12, p. 558.]

42-1411. Report of the director. – (1) The director shall prepare a report on the water system. The report shall consist of three (3) parts. The first part of the report shall contain the director's determination of the rights to the use of water from the water system in accordance with the provisions of subsection (2) of this section and a description of the water system. The second part of the report shall contain an abstract of each notice of claim or negotiated agreement for all water rights reserved under federal law in accordance with the provisions of subsection (3) of this section. The third part of the report shall contain the notices of claim or negotiated agreements filed by any claimants of rights reserved under federal law.

(2) The director shall determine the following elements with respect to all water rights acquired under state law:

(a) the name and address of the claimant;

(b) the source of water;

(c) the quantity of water used in cubic feet per second or the quantity of water stored in acre-feet per year;

(d) the date of priority;

(e) the legal description of the point(s) of diversion; if the claim is for an instream flow, then a legal description of the beginning and ending points of the claimed instream flow;

(f) the purpose of use;

(g) the period of the year when water is used for such purposes;

(h) a legal description of the place of use; if one (1) of the purposes of use is irrigation, then the number of irrigated acres within each forty (40) acre subdivision, except as provided in section 42-219, Idaho Code;
(i) the annual volume of consumptive use; and
(j) such other matters as are necessary to define the right.

(3) The director shall abstract the notices of claim or negotiated agreements for all water rights reserved under federal law. The abstract shall summarize the notices of claim or negotiated agreement for all water rights reserved under federal law but shall not change in any substantive manner the claimed or negotiated water right. The abstract shall include the following elements, as applicable:
(a) the name and address of the claimant;
(b) the source of water;
(c) the total quantity of water claimed to be reserved for each and every purpose, including all present and future uses;
(d) the date of priority;
(e) the legal description of the existing point(s) of diversion; if the claim is for an instream flow, then a legal description of the beginning and ending points of the claimed instream flow;
(f) the period of the year when water is necessary for such purposes;
(g) the annual volume of consumptive use;
(h) a legal description of the reservation;
(i) such other matters as the court may require to define the right in accordance with federal law.

(4) The director shall file an original of the report with the district court. The director shall distribute for display and review by parties, at least one (1) copy of parts I and II of the report to each county wherein a

portion of the water system is located. The director shall also serve on each claimant or the claimant's attorney at the last known post office address a notice of filing of the director's report. The notice shall be prepared by the director using plain and concise language and shall include:
(a) a statement that the director's report of the various rights to be adjudicated within the water system has been filed with the district court, naming the district court with which the report was filed;
(b) a copy of that portion of the report setting forth the claimant's water right;
(c) a statement that a complete copy of parts I and II of the report is available for inspection, listing the locations at which the report is available, which shall include the office of the clerk of the district court for each county in which any part of the stream system is located, the offices of the department, and any other locations the director may designate;
(d) a statement that all or a portion of the report is available upon request at the offices of the department, subject to payment of a reasonable fee to cover costs of reproduction and mailing;
(e) a statement that any party may file objections to any portion of the report with the district court specified in the notice and must mail a copy of the objection to the director, and to the claimant of each claimed or negotiated right objected to, if the objector is not also the claimant of the right for which the objection is filed;
(f) the date prior to which all objections must be filed, which shall not be less than sixty (60) days for any director's report containing five hundred (500) claims or less, one hundred twenty (120) days for any director's report containing more than five hundred (500) claims and not more than five thousand (5,000) claims, and one hundred eighty (180) days for any director's report

containing more than five thousand (5,000) claims; the above-stated periods of time shall commence on the date of service by mail of the notice of filing;

(g) a statement that the director shall file responses to objections to the first part of the report, that the director shall mail copies of the response to the objector and the claimant of the right objected to, that the claimant of the right objected to may file a response to an objection and that the claimant in such event shall mail a copy of any response to the objector and to the director;

(h) a statement that claimants of claims or negotiated rights listed in the second part of the report may file responses to objections filed against their claims or negotiated rights, and that a copy of any response must be mailed to the director, and to the objector, if the objector is not the director;

(i) the date prior to which all responses to objections must be filed with the court, which shall not be less than one hundred twenty (12) [120] days following receipt of a copy of the objection; and

(j) a statement that any part of the report to which no objections are filed shall be decreed by the district court and the time and location set for the hearing at which the unobjected parts of the report will be decreed, which time shall not be less than sixty (60) days following the expiration of the period for filing responses to objections.

(5) The director shall file an affidavit with the district court demonstrating compliance with the notice requirements of subsection (4) of this section. [I.C., § 42-1411, as added by 1986, ch. 220, § 13, p. 558.]

42-1412. Objections – Responses to objections – Hearing before district judge – Entry of final decree. – (1) Any party who desires to object to parts I or II of the director's report shall file the party's objections with the district court within the time specified in the notice of

filing of the report. The party shall also send a copy of the objection to the claimant whose water right claim or negotiated right is the subject of the objection and to the director.

(2) The director shall file with the district court a response to any objection to part I of the report within the time specified in the notice of filing of the report. The director shall attach to each response the original of the notice of claim. The director shall mail a copy of the response to the objector and the claimant whose right is the subject of the objection. A claimant may file with the district court a response to any objection filed with respect to the claimant's water right within the time specified in the notice of filing of the report. The claimant shall mail a copy of any response to the objector and to the director.

(3) Any claimant of a water right reserved under federal law may file with the district court a response to any objection filed with respect to the claimant's water right described in part II of the report within the time specified in the notice of filing of the report. The claimant shall mail a copy of any response to the objector and to the director.

(4) The report of the director, objections, responses to objections, notices of claims and any negotiated agreement between the state of Idaho and any federal reserved water right claimant shall constitute the pleadings. The district court may allow such further or amended pleadings as may be necessary for a final determination of the proceedings.

(5) Following expiration of the period for filing objections and responses thereto, the district court may

convene pretrial conferences on an objection or any group of objections. Following consultation with the parties, the district court may enter a pretrial order. The pretrial order may establish the following:

(a) the date when all pretrial motions shall be filed;
(b) the date when all discovery shall be completed; and
(c) the date for the trial on the objection(s).

(6) The district court shall provide the director, each party who objected, and each claimant whose claimed or negotiated right is the subject of the objection, written notice of the pretrial conference at least thirty (30) days prior to the date set for the pretrial conference.

(7) The district court or special master shall conduct the trial without a jury on an objection or any group of objections in accordance with the Idaho rules of civil procedure.

(8) The district court shall enter a partial decree determining the nature and extent of the water right which is the subject of the objection or other matters which are the subject of the objection. The decree shall contain or incorporate a statement of each element of a water right as stated in subsections (2) and (3) of section 42-1411, Idaho Code, as applicable, except that a decree for any adjudication commenced prior to July 1, 1986, need not contain a determination of the annual volume of consumptive use for any water right. The decree shall also determine all other matters necessary for the efficient administration of the water rights. Upon entry of the decree, the clerk of the district court shall send a certified copy of the decree to the director in accordance with section 42-1403, Idaho Code. The clerk of the district court shall notify the objector and claimant of each right

as to which an objection was determined by the district court of entry of the decree in the manner provided in the Idaho rules of civil procedure, except that the director may prepare and provide to the clerk sufficient copies for service of a notice of entry of the decree.

(9) Not less than sixty (60) days after the expiration of the period for filing responses to objections, the director shall file with the district court a statement of those portions of parts I and II of the director's report for which no objection was filed. The portions of the director's report for which no objection was filed shall be admitted as true facts. Following hearing, the district court shall enter a partial decree as to those portions of parts I and II of the report, including all matters necessary for the efficient administration of the water rights, for which no objection has been filed. The decree shall contain or incorporate a statement of each element of a water right as stated in subsections (2) and (3) of section 42-1411, Idaho Code, as applicable, except that a decree for any adjudication commenced prior to July 1, 1986, need not contain a determination of the annual volume of consumptive use. Upon entry of the decree, the clerk of the district court shall send a certified copy of the decree to the director in accordance with section 42-1403, Idaho Code. The clerk of the district court shall notify each claimant of entry of the decree in the manner provided in the Idaho rules of civil procedure, except that the director may prepare and provide to the clerk, sufficient copies for service of a notice of entry of the decree.

(10) Upon resolution of all objections and entry of partial decree(s) pursuant to subsection (8) of this section

and entry of a partial decree for unobjected claims pursuant to subsection (9) of this section, the director shall combine all partial decrees into a final decree and submit the final decree to the district court for approval.

(11) The district court may extend or shorten the time for filing any objection to the director's report or any response to an objection. [I.C. § 42-1412, as added by 1986, ch. 220, § 14, p. 558; am. 1987, ch. 158, § 1, p. 308.]

42-1413. Filing of final decree. – (1) When a decree has become final in an adjudication in which the director filed a report, the director shall file a certified copy of the decree or a transcript thereof in the office of the county recorder of each county in which the place of use or point of diversion of the water rights contained in the decree is located.

(2) When a decree has become final in an adjudication in which the director has not filed a report, the clerk of the district court in which the decree is entered shall file a certified copy of the decree or a transcript thereof in the office of the county recorder for each county in which the place of use or point of diversion of the water rights decreed is located, and shall send a certified copy of the decree to the director as required in section 42-1403, Idaho Code.

(3) The transcript of decree shall contain the following:

(a) title of the district court;
(b) name of the case;
(c) the case number;
(d) names of each party;
(e) date of entry;

(f) the description of the boundaries of the water system, which is the subject of the general adjudication;
(g) a statement that the decree is entered in the records of the clerk of the district court;
(h) a statement that information as to the rights decreed is available at the offices of the department; and
(i) such other information as may be necessary to assist any person searching the title of a parcel to find the decree.

(4) A decree or transcript recorded pursuant to this section from the time it is filed with the recorder for record, is constructive notice of the contents of the decree within the county in which the decree or transcript is recorded to subsequent purchasers and mortgagees. [I.C., § 42-1413, as added by 1986, ch. 220, § 15, p. 558.]

42-1414. Fees for filing notice of claims. – In order to provide an adequate and equitable cost-sharing formula for financing the costs of adjudicating water rights the department of water resources shall accept no notice of claim required under the provisions of section 42-1409, Idaho Code, unless such notice of claim is submitted with a filing fee based upon the fee schedule set forth below. Failure to pay the variable water use fee in accordance with the timetable provided shall be cause for the department to reject and return the notice of claim to the claimant. The fee schedule set forth below applies to adjudication proceedings commenced or enlarged on or after January 1, 1985, and to adjudication proceedings for which a proposed finding of water rights has not been filed with the appropriate district court by the department of water resources prior to January 1, 1985.

(1) Flat fee per claim filed:
(a) Claims for domestic and/or stockwatering rights $25.00
(b) Claims for all other rights $50.00

(2) Additional variable water use fee for claims filed based upon acreage, power generating capacity, c.f.s., or equivalent volume of water:
(a) Irrigation use (one fee irrespective of number of claims):.....$1.00 per acre
(b) Power:....$3.50 per kilowatt of capacity (manufacturer's nameplate rating)
(c) Aquaculture:.....$10.00 per c.f.s.
(d) Municipal, industrial, commercial, mining, heating, cooling:.....$100.00 per c.f.s.
(e) Public instream flow, public lake level maintenance, wildlife:.....$100.00 per c.f.s.

(3) Payment of a variable water use fee of more than one thousand dollars ($1,000) may be spread out over as many as five (5) annual equal payments with ten percent (10%) interest accruing on the unpaid balance. All fees collected by the department pursuant to this section shall be placed in the water resources adjudication account established in section 42-1777, Idaho Code. [I.C. § 42-1414, as added by 1971, ch. 153, § 1, p. 753; am. 1972, ch. 23, § 1, p. 28; am. 1985, ch. 18, § 3, p. 27.]

42-1415. Enforcement of extended variable fee. – After filing of the director's report in a general adjudication, the director may prohibit the diversion and use of water in satisfaction of a right claimed or decreed in the adjudication upon the failure of the claimant to comply with the schedule for payment of variable fees as set forth in subsection (3) of section 42-1414, Idaho Code. [I.C., § 42-1415, as added by 1986, ch. 220, § 16, p. 558.]

42-1416. Presumptions in basin-wide adjudication. – In any basin-wide adjudication, the following shall apply:

(1) The holders of previously adjudicated water rights shall be presumed to have validly applied all water to beneficial use on the lands being irrigated at the time of basin-wide adjudication with no change in the priority dates of the original rights.

(2) Expansion of the use after acquisition of a valid unadjudicated water right in violation of the mandatory permit requirements shall be presumed to be valid and to have created a water right with a priority date as of the completion of the expansion, in the absence of injury to other appropriators.

(3) A prior decree adjudicating a tributary stream or subbasin within the basin shall be presumed correct, if:
(a) It is or can be made substantially correct as to current water rights; and
(b) Contains all the elements necessary to adequately describe the water rights included in the decree.

(4) The presumptions established in this section are rebuttable.

(5) The presumptions established in this section shall not apply in any area designated by the department as a critical groundwater area for expansion of use that occurred after the date of designation. [I.C., § 42-1416, as added by 1985, ch. 19, § 1, p. 31.]

42-1416A. Prior change in point of diversion, place of use, period of use, or nature of use of water right claimed in a general adjudication. – (1) If any person entitled to the use of water has made a change in point of diversion, place of use, period of use or nature of use of all or a part of the water, including a change as part of an

exchange as defined by section 42-105, Idaho Code, prior to entry of an order commencing a general adjudication pursuant to section 42-1408, Idaho Code, and the person entitled to the use of water has not complied with the requirements of sections 42-108 and 42-222, Idaho Code, regarding such changes, the following shall apply:

(a) the water right may be claimed in the general adjudication as changed and an application for change of the water right is not required to be filed pursuant to section 42-222, Idaho Code; and

(b) the water right may be determined by the director in the director's report pursuant to section 42-1411, Idaho Code, and decreed by the district court pursuant to section 42-1412, Idaho Code, as changed, if the change meets the substantive criteria of section 42-222, Idaho Code, for approval of such changes, provided that the change may be approved subject to conditions necessary to satisfy the substantive criteria of section 42-222, Idaho Code, for approval of such changes.

(2) To the extent that the provisions of this section and section 42-1416, Idaho Code, are both applicable to the same water right, the two sections shall be applied conjunctively, if possible, but this section shall not be construed to limit the provisions of section 42-1416, Idaho Code. [I.C., § 42-1416A, as added by 1989, ch. 97, § 1, p. 226.]

42-1416B. Claim for expanded use in critical ground water area – Determination of water availability. – (1) Within any critical ground water area designated pursuant to section 42-233a, Idaho Code, a claim to the expanded use of a ground water right, which use was

expanded in violation of the mandatory permit requirements, may be decreed in a general water rights adjudication if the expansion occurred after the designation of the critical ground water area, before the commencement of the adjudication, and before the date of enactment of this section. The priority date for the right decreed shall be June 30, 1985.

(2) Water shall be deemed unavailable to fill the rights for expanded use, even if decreed in the adjudication, unless the director finds that a management program exists which will, within a time period acceptable to the director, limit the average annual water withdrawals from the aquifer designated in the critical ground water area to no more than the average annual recharge to the aquifer.

(3) Within two (2) years after a decree determining the water rights within a critical ground water area becomes final, but not sooner than four (4) years from the date of enactment of this section, the director of the department of water resources shall make a finding as to whether an adequate management program exists to bring withdrawals into balance with recharge.

(4) If the director finds that an adequate management program to bring withdrawals into balance with recharge does not exist, the director shall order all holders of rights to expanded use of ground water within the area to cease or reduce withdrawal of water until such time as the director determines that withdrawals have been brought into balance with recharge and sufficient ground water is available to resume or increase withdrawals. The director's order shall be issued before

September 1 and shall be effective beginning with the following growing season.

(5) For purposes of this section, the following definitions shall apply:

(a) "Expanded use" means an increase in the number of acres irrigated, or other additional use, under a valid ground water right without any increase in the rate of diversion or volume of water diverted.

(b) "Management program" means a program to recharge the aquifer, limit withdrawals from the aquifer or provide surface water supplies for all, or a portion, of the land irrigated with water withdrawn from the aquifer, including any actions designed to bring withdrawals into balance with the average annual recharge to the aquifer.

(c) "Recharge" refers to all processes, natural or artificial, which add water to the aquifer.

(d) "Withdrawal" refers to all processes, natural or artificial, which take water from the acquifer.

(6) The hearing and judicial review provisions of section 42-1701A, Idaho Code, shall apply to any findings and orders issued by the director pursuant to this section.

(7) Nothing contained in this section shall be construed to limit the authority of the director of the department of water resources to administer and enforce any other ground water laws of the state. [I.C., § 42-1416B, as added by 1989, ch. 212, § 1, p. 521.]

42-1417. General adjudication – Interim administration of water rights. – (1) At any time after filing of the director's report, the district court may, by order, permit the formation of water districts and the delivery of water in all or part of the water system pursuant to chapter 6, title 42, Idaho Code. The district court may permit the delivery of water in a water district:

(a) in accordance with part I of the director's report or as modified by the court's order;

(b) in accordance with the notices of claims abstracted in part II of the director's report upon a preliminary determination that the claimants of the rights to be administered are reasonably likely to prevail on the merits of their claims, or if not, then as modified by the court's order; or

(c) in accordance with negotiated agreements abstracted in part II of the director's report or as modified by the court's order; and

(d) in accordance with applicable partial decree(s).

(2) The district court may enter the order only:

(a) upon a motion by the director or by a claimant of water from the water system;

(b) after notice by the moving party by mail to the director and each claimant of water from the water system or portion thereof that could reasonably be determined to be adversely affected by entry of the order; and

(c) upon a determination by the court, after hearing, that the interim administration of water rights in accordance with the report, or as the report is modified by the court's order, and in accordance with any partial decree(s), is reasonably necessary to protect senior water rights.

(3) Immediately upon entry of the court's order of interim administration of water rights, the clerk of the district court shall mail a certified copy of the order to the director, and the director shall immediately give notice of the order to the watermaster of the water districts affected by the order.

(4) The provisions of this section shall not apply to the delivery of federal reserved water rights within a federally recognized Indian reservation. [I.C., § 42-1417,

as added by 1986, ch. 220, § 17, p. 558; am. 1987, ch. 158, § 2, p. 308.]

42-1418. Appeals. – An appeal may be taken to the supreme court from an order, partial decree, or decree of the district court in any adjudication proceeding as provided by rule or order of the supreme court. [I.C., § 42-1418, as added by 1986, ch. 230, § 3, p. 621.]

42-1419. Entry of an order commencing a general adjudication on a special docket – Constructive notice – Filing of certified copy of order in other counties. – (1) The clerk of the district court shall enter an order commencing a general adjudication on a special docket for water right adjudications in addition to any other district court record.

(2) From the time of docketing and not before, any order commencing a general adjudication is constructive notice of the contents thereof, within the county in which the order is docketed, to subsequent purchasers and mortgagees.

(3) The director shall file a true and certified copy of any order commencing a general adjudication with the district court for each county of this state where the water system to be adjudicated is located. The clerk of the district court shall file and docket the same as provided in subsection (1) of this section. From the time of such docketing and not before, the order so docketed is constructive notice of the contents thereof within the county in which the order is docketed to subsequent purchasers and mortgagees. [I.C., § 42-1419, as added by 1986, ch. 220, § 19, p. 558.]

42-1420. Binding effect of decree – Exceptions. – (1) The decree entered in a general adjudication commenced under the provisions of sections 42-1406 or 42-1406A, Idaho Code, shall be binding on all persons [parties] and conclusive as to the nature and extent of the water rights of all persons [parties], including all unknown parties, except that the following described water rights shall not be lost by failure to file a notice of claim or negotiated agreement:

(a) a water right for domestic use or stock watering use, specifically excluded from the general adjudication by court order;

(b) a water right application for permit filed under chapters 2 or 15, title 42, Idaho Code;

(c) a water right permit issued under chapters 2 or 15, title 42, Idaho Code, unless the director required the permit holder to file a notice of claim in accordance with subsection (9) of section 42-1409, Idaho Code; and

(d) a claim to a water right under federal law, if the priority of the right claimed is later than and junior to the date of entry of the order commencing the general adjudication.

(2) The exceptions from the conclusive effect of a decree in a general adjudication stated in subsection (1) above shall not apply to any water right for which a notice of claim or negotiated agreement is filed. [I.C., § 42-1420, as added by 1986, ch. 220, § 20, p. 558 and 1986, ch. 230, § 4, p. 621.]

42-1421. Procedures for adjudication of unperfected water rights initiated under state law – Director's jurisdiction. – (1) All persons claiming a water right based on an application or permit on the date of entry of the order commencing a general adjudication are not required to

file a notice of claim unless required in accordance with subsection (9) of section 42-1409, Idaho Code. If the director approves the application in whole or in part during the pendency of a general adjudication and prior to filing the director's report, the director shall notify the permit holder of the pendency of the general adjudication. A permit holder who is not required by the director to file a notice of claim in accordance with subsection (9) of section 42-1409, Idaho Code, may file a notice of claim at any time prior to filing the director's report.

(2) All persons claiming a water right based on a water right license existing on the date of entry of the order commencing a general adjudication shall file a notice of claim.

(3) The district court shall decree any claimed water right for which proof of beneficial use has not been filed, but shall state that the right is conditioned upon completion of the appropriation in accordance with the laws of the state governing the appropriation of water and that the decreed right shall be subject to the terms of the license to appropriate water that is ultimately issued.

(4) The director retains jurisdiction of all applications, permits and licenses under chapters 2 or 15, title 42, Idaho Code, to take action authorized by the conditions contained in any permit or license or by applicable law. [I.C., § 42-1421, as added by 1986, ch. 220, § 21, p. 558.]

42-1422. Special master – Appointment – Powers and duties – Compensation – Disqualification – Review of special master's report. – (1) The district court may appoint one or more special masters in any general adjudication, in accordance with the following procedures:

(a) upon the district court's own motion;
(b) upon agreement of the parties; or
(c) upon motion of any party.

(2) A special master(s) shall be appointed to determine the water right claims asserted in the general adjudication authorized in section 42-1406A, Idaho Code, upon request of a party.

(3) The district court shall specify the powers and duties of a special master in the order of reference. The compensation and disqualification of a special master shall be governed by order or rule of the supreme court.

(4) Objections to and hearing on the special master's report shall be governed by rule 53(e) of the Idaho rules of civil procedure. [I.C., § 42-1422, as added by 1986, ch. 230, § 5, p. 621.]

42-1423. Severability. – The provisions of this act are hereby declared to be severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this act. [I.C., § 42-1423, as added by 1986, ch. 220, § 23, p. 558.]

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In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF IDAHO, EX REL. DIRECTOR,
IDAHO DEPARTMENT OF WATER RESOURCES

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

REPLY BRIEF FOR THE UNITED STATES

KENNETH W. STARR
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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-190

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF IDAHO, EX REL. DIRECTOR,
IDAHO DEPARTMENT OF WATER RESOURCES

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

REPLY BRIEF FOR THE UNITED STATES

The Idaho Supreme Court has ruled that the United States shall not be allowed to defend its water rights in a general stream adjudication unless the United States pays "filing fees," totalling more than $10 million, to finance the State's costs in the adjudication. This Court should review that erroneous decision because it presents a direct clash between the United States and an individual State concerning the scope of the federal government's sovereign immunity, will impair administration of federal programs, and will confound water rights litigation throughout the western States. Idaho's response to our petition reinforces our submission. The State's arguments are utterly at odds with this Court's decisions and the plain language of the relevant laws, and they highlight the confusion that the decision will create.

1. Idaho errs at the outset in its characterization of the proceedings in this suit. The State portrays its Director of the Department of Water Resources as a "fact finder for the court" whose role "is to facilitate the adjudication by providing assistance to claimants in the filing of their claims, by reviewing the claims and by preparing a report on all claims." Br. in Opp. 6 n.6, 7. The Idaho statute expressly states, however, that the Director is a *party* to the suit. Idaho Code § 42-1401A(7) (1990).[1] Indeed, the Director initiated this adjudication, joining the United States as a defendant pursuant to the McCarran Amendment (43 U.S.C. 666). Pet. App. 5a; see Idaho Code §§ 42-1406, 42-1406A (1990). If the Director disagrees with the United States' water rights claims, he may contest them, and if unsuccessful, he may appeal the district court's judgment. Idaho Code §§ 42-1412, 42-1418 (1990). Thus, the Director is not acting as a disinterested factfinder or stakeholder, but rather as a litigant who has sued the United States pursuant to the McCarran Amendment and who has interests adverse to those of the United States and the Indian Tribes the federal government represents. See Amici Br. for the Nez Perce Tribe *et al.*[2]

Idaho portrays the United States as a beneficiary of the Director's suit. Br. in Opp. 6-7, 10, 22. As Justice Johnson

[1] The state statute instructs the Director to collect the United States' claims and file a report describing them, Idaho Code §§ 42-1409 to 42-1411 (1990), but the claims, the Director's report, any objections, and the Director's responses thereto are expressly denominated as "pleadings." Idaho Code § 42-1412(4) (1990). Thus, the recommendations to be contained in the Director's report will be titled "proposed findings of fact." Tr. 611.

[2] The Idaho Code separately provides for the appointment of a special master to assist the court "to determine the water right claims asserted in the general adjudication." Idaho Code 42-1422 (1990). The Idaho Supreme Court has specifically ruled that the Director cannot act as a special master in light of his participation as a party in the litigation. See *Avondale Irrigation Dist.* v. *North Idaho Properties, Inc.*, 523 P.2d 818, 822 (1974). Cf. *United States* v. *Superior Court*, 697 P.2d 658, 671-674 (Ariz. 1985) (state water resource agency does not act as "an adjudicator of law or fact" in a general stream adjudication).

noted, however, the true beneficiaries are Idaho and the Idaho Power Company (who arranged for this litigation in the course of settling their prior lawsuit), not the United States and the thousands of other defendants who must participate in the adjudication to retain their water rights. See Pet. 6.[3] Idaho also speaks glowingly of the "special services" the Director provides, Br. in Opp. 7 & n.7, 10 n.10, 22. But the services described in the Idaho Code—such as serving process and collecting claims, *id.* at 22—are simply obligations that ought to be assumed by the Director as the initiator of this lawsuit. Other services the Director purports to provide to Idaho citizens—such as assistance in drafting claims, *id.* at 7 & n.7, 22—are not specifically included as a statutory responsibility, see Tr. 1178-1179, and are neither requested by nor of any benefit to the United States.[4] Indeed, as we explained in our petition, the Director will actually employ the filing fees paid by the United States to fund, among other things, challenges to the United States' water right claims. See Pet. 7-8.[5]

[3] As Justice Johnson stated, "The long and short of it is that the Idaho Power Company and the State of Idaho set the SRBA [Snake River Basin Adjudication] in motion. The United States is just along for the ride, pursuant to the McCarran Amendment." Pet. App. 28a (Johnson, J., dissenting).

[4] Idaho indicates that it "makes extensive information available to claimants, including specially prepared hydrologic studies, computer modelling and orthophotoquad maps." Br. in Opp. 7. In fact, state-prepared hydrologic studies and computer modelling are available only at *additional* cost to a claimant. See Tr. 1184-1185.

[5] Idaho incorrectly states that "[t]he filing fees in the SRBA are not used to pay adversarial 'litigation' costs of the State." Br. in Opp. 10. The filing fees are used to pay attorney and other costs incurred by the Director in the adjudication, including costs for service of process, investigation of matters to be included in the Director's Report, preparation of the report, defense of the report, conduct of discovery, preparation of legal exhibits, drafting of pleadings, preparation of expert witnesses for trial, appearance of witnesses at trial, and numerous other activities by the Director and his staff. See Pet. 7-8. Indeed, the State has projected $2.1 million in attorney salary costs chargeable to the adjudication account. See Tr. 417, 545-546.

2. However Idaho chooses to characterize the Director's role in this litigation, it is clear that Idaho may not lawfully assess filing fees against the United States unless it can demonstrate that Congress has unambiguously waived the United States' sovereign immunity from those assessments. See, *e.g.*, *United States Dep't of Energy* v. *Ohio*, 112 S. Ct. 1627, 1633 (1992). The McCarran Amendment contains no such waiver. As we explained in our petition, the Amendment has three central features:

> (1) it allows joinder of the United States as a defendant in water rights adjudications if it appears that the United States is the owner of or is in the process of acquiring water rights "by appropriation under State law, by purchase, by exchange, or otherwise";
>
> (2) it deems the United States "to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty"; and
>
> (3) it subjects the United States to judgments and orders of the court having jurisdiction, except that "no judgment for costs shall be entered against the United States in any such suit."

43 U.S.C. 666(a). See Pet. 4-5, 12. The McCarran Amendment contains no express waiver of the United States' immunity from filing fees.

Idaho concedes that it must demonstrate that the McCarran Amendment unambiguously waives the United States' sovereign immunity from fee assessments. Br. in Opp. 12-13. The State additionally concedes that the first

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Significantly, Idaho itself highlights the "skewed" nature of its fee assessments. Br. in Opp. 9 n.8. The State notes that the largest *number* of the United States' water right claims are for domestic and stock watering uses, which are not subject to a variable fee. But the bulk of the total fee *amount* charged against the United States consists of variable fees assessed against federal reserved water right claims. See Pet. 8.

provision of the Amendment, which grants the United States' consent to *suit*, does not suffice as a waiver of immunity to fees. *Id.* at 15.[6] Idaho contends instead that the second provision, which waives the United States' right to plead that "the State laws" are inapplicable, "contains the critical waiver of sovereign immunity." *Id.* at 15-16. In Idaho's view, "the State laws" must refer to filing fee requirements, because a more restrictive interpretation "would unduly restrict the Amendment." *Id.* at 18. But as we explained in our petition (at 16-17), that phrase has a clearly discernible—and quite different—meaning.

As Idaho acknowledges, Congress's use of the definite article "the" before "State laws" indicates that "the term 'state laws' refers to a particular set of laws." Br. in Opp. 19. Congress clearly identified in the preceding sentence the particular body of "State law" to which it was referring. That sentence subjects the United States to suit where it appears that the United States is the owner of or is in the process of acquiring water rights "by appropriation under State law." 43 U.S.C. 666(a). There is no reason to doubt that the body of state law referred to in the first and second sentences is one and the same: the state laws governing "acqui[sition of] water rights by appropriation." 43 U.S.C. 666(a). The first sentence subjects the United States to joinder as a defendant if (among other things) its appears that the United States has acquired or is acquiring water rights by appropriation under state law. The second sentence prevents the United States from pleading sovereign immunity to excuse its failure to follow state-law requirements for acquiring those rights. But neither sentence prevents the United

---

[6] Idaho states that "Congress realized that merely consenting to joinder of the United States in an adjudication 'suit' did not go far enough. • • • Further consent was needed from Congress, beyond simply joining the United States in such suits, to require the United States to comply with these special adjudication requirements." Br. in Opp. 15.

States from asserting immunity from other state-law provisions, includ-ing statutes assessing fees and costs in litigating those rights. See Pet. 16-17.

Contrary to Idaho's assertion, that interpretation does not "violate[] common sense rules of construction." Br. in Opp. 19. As this Court has explained, "[s]tatutory construction * * * is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear." *United Sav. Ass'n* v. *Timbers of Inwood Forest Associates*, 484 U.S. 365, 371 (1988). In this instance, it is sensible to consider the McCarran Amendment's prior reference to "State law" in determining what Congress meant when it later used the term "the State laws." By contrast, Idaho's assertion that the term refers to "adjudication laws" (Br. in Opp. 19) finds no similar support in the statute. Indeed, Idaho does not explain from whence it derived that construction.[7]

Idaho also contends that our interpretation "fails to make sense." Br. in Opp. 19 n.15. To the contrary, our interpretation makes perfect sense, especially when the interpretation is viewed in context. The first sentence of the McCarran Amendment gives Congress's consent "to join the United States as a defendant" in a general stream adjudication. 43 U.S.C. 666(a). But that sentence does not

[7] There is no merit to Idaho's contention that "[t]he United States is only rearguing issues previously rejected by the Court." Br. in Opp. 16; see also *id.* at 18, 19. No prior decision of this Court has held, or even remotely suggested, that the McCarran Amendment constitutes a waiver of federal sovereign immunity from filing fees. Idaho's contention that this Court has "consistently characterized the waiver in the McCarran Amendment as 'all-inclusive,'" Br. in Opp. 18, mischaracterizes this Court's McCarran Amendment decisions. The cases Idaho cites, *United States* v. *District Court for Eagle County*, 401 U.S. 520, 523 (1971), and *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 810 (1976), construed the first sentence of the McCarran Amendment as "all-inclusive" with respect to the water right claims that may be adjudicated on the merits. They did not concern filing fees.

prevent the United States from asserting that it is immune from various substantive requirements—such as notice, filing, or beneficial use requirements—that a State imposes on citizens who acquire water rights through state doctrines of prior appropriation. It is the second sentence of the McCarran Amendment, which precludes the United States from pleading that "the State laws are inapplicable," 43 U.S.C. 666(a), that prevents the United States from asserting sovereign immunity as an excuse for failing to comply with those substantive requirements. That sentence does not, however, waive the United States' immunity from other state laws—especially the United States' distinct immunity from fees and costs.[8]

The McCarran Amendment plainly does not contain an unequivocal waiver of sovereign immunity from filing fees. See, *e.g.*, *United States Dep't of Energy*, 112 S. Ct. at 1633. This is particularly clear in light of this Court's requirement that Congress provide a "separate waiver" to eliminate the United States' immunity for matters ancillary to the merits of a lawsuit, such as attorney's fees, interest, and costs. See *Library of Congress* v. *Shaw*, 478 U.S. 310, 314-315 (1986). See Pet. 14-15, 17. The filing fees at issue here, which are assessed "for financing the costs of adjudicating water rights," Idaho Code § 42-1414 (1990), clearly require a separate waiver, regardless of whether Idaho chooses to describe them as "fees" or "costs" (Br. in Opp. 20-21). See *Library of Congress*, 478 U.S. at 321 (sovereign immunity may not be avoided "by devising a new name for an old institution"). Far from

[8] Our interpretation also explains why the McCarran Amendment does not waive the United States' immunity from state laws that purport to restrict federal reserved water rights. The McCarran Amendment waives the United States' immunity only with respect to "the State laws" governing acquisition of "water rights by appropriation." 43 U.S.C. 666(a).

providing a "separate waiver," the McCarran Amendment specifically states that "no judgment for costs shall be entered against the United States." 43 U.S.C. 666.[9] No reason exists for believing that Congress intended that a State could recover its costs indirectly, merely by assessing "filing fees." See Pet. 17-18.[10]

3. Respondent disputes our showing (Pet. 19-20) that this case merits the Court's review, asserting that "during the forty years since the enactment of the McCarran Amendment the United States has consistently paid filing fees in adjudications around the West," and that the "only reason for this appeal is the size and nature of the present adjudication." Br. in Opp. 12; see *id.* at 25-26. Contrary to Idaho's assertions, the United States has consistently opposed the assessment of filing fees in general stream adjudications. See, *e.g.*, *United States* v. *Oregon Water Resources Dep't*, 774 F. Supp. 1568, 1580-1581 (D. Or. 1991); *United States* v. *City & County of Denver*, 656 P.2d 1, 15 (Colo. 1982). In light of "the generally applicable principle *de minimis non curat lex*," *Republic of Argentina* v. *Weltover, Inc.*, 112 S. Ct. 2160, 2168 (1992), the United States has frequently paid the fees

[9] Idaho's filing fees are the functional equivalent of a judgment for costs in a general stream adjudication, because the filing fees accomplish the same cost-shifting result for the State that was previously accomplished in Idaho by a judgment for costs. The filing fee requirement simply moves the timing of that cost-shifting forward to the start of the litigation. See Pet. 17-18; see also note 5, *supra*.

[10] Idaho insists that "several states in 1952 provided for graduated filing fees analogous to the fees contested in this case" (Br. in Opp. 21 n.16), citing the Nevada, Arizona, and Oregon statutes. Even if correct, that would not mean that Congress waived the United States' immunity from filing fees in the McCarran Amendment, because the Amendment contains no clear and unambiguous waiver of federal sovereign immunity from filing fees. In any event, no State assessed comparable fees in judicial water rights proceedings—the only type of proceeding to which the McCarran Amendment applies. See Pet. 18 n.10. Nevada, Oregon, and Arizona, required payment of filing fees in water rights adjudications initiated by administrative proceedings. See *ibid.*

under protest, declining to seek judicial review of de minimis assessments.[11] The fees assessed in this case, which will total more than $10 million, are far from de minimis, and they therefore provide the appropriate case for this Court's review.[12]

Idaho also asserts that "the issues raised by the United States regarding filing fees are unlikely to arise in future cases." Br. in Opp. 26. But as Idaho itself has acknowledged, States have frequently attempted to assess filing fees against the United States. Br. in Opp. 23-24. And as Justice Boyle explained below, the Idaho Supreme Court's decision will invite other States to impose similarly rapacious filing fees against the United States. See Pet. App. 40a (Boyle, J. dissenting). The state assessments will deplete federal agency funds by diverting them from federal to state agencies. Unless this Court acts, the issue will become a recurring source of conflict between the federal government and the western States.[13]

[11] For example, in the *City & County of Denver* litigation, the United States paid $3,728 in fees under protest and did not seek review of the assessment in the Colorado Supreme Court. See *City & County of Denver*, 656 P.2d at 15, 20 n.33.

[12] It is not surprising, given the importance of federal supremacy, that this Court has consistently reviewed state attempts to infringe on federal sovereignty, with little regard for the "size" or "nature" of the state impositions at issue. See, *e.g.*, *Leslie Miller, Inc.* v. *Arkansas*, 352 U.S. 187 (1956) (state licensing of contractors on federal projects); *Mayo* v. *United States*, 319 U.S. 441 (1943) (state assessment of fertilizer inspection fee); *Ohio* v. *Thomas*, 173 U.S. 276 (1899) (state prohibition on using margarine in a federal soldiers' home). The United States should not be penalized for showing restraint and declining to seek this Court's review until state action seriously impairs federal and Indian interests. See also *Arizona* v. *San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983).

[13] Although Idaho tries to persuade this Court that the filing fee issue is not important, the State has taken a dramatically different position below. Since Idaho filed its brief in opposition in this Court, the Director has written to the United States' trial counsel, stating that "[t]he importance of the filing fee issue cannot be underestimated" and emphasizing the "gravity of this matter" with respect to the State's conduct of water rights adjudications. See Addendum, *infra*. We have

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

OCTOBER 1992

no reason to doubt that other western States will be equally insistent that the United States fund their water rights adjudications.

ADDENDUM

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
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October 2, 1992

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RE: Federal Claims for Test Reporting Areas

Dear Peter and Jack:

I have filed the United States' water right claims for Reporting Areas 34, 2, and 3 as ordered by the Fifth Judicial District Court to facilitate progress toward completion of the SRBA. My acceptance of

the claims should in no way be construed, however, as a waiver of my legal duty to accept claims for filing only upon payment of filing fees. Indeed, assuming that the Idaho Supreme Court decision requiring payment of filing fees by the United States is not altered by the United States Supreme Court, I fully expect the United States will immediately pay filing fees for the claims reported in the test reporting areas. A final decree of these claims is contingent upon the fees being paid.

The importance of the filing fee issue cannot be underestimated. The Snake River Basin Adjudication is premised upon each claimant, including the United States, paying an equitable share of the expenses of the adjudication. If the United States successfully avoids paying for its fair share of the services provided by IDWR to all claimants, then, in my opinion, the United States should not enjoy the benefits of the adjudication. Indeed, I intend to seek legislation excluding the United States form [*sic*] the Snake River Basin Adjudication if the United States does not pay fees.

While I recognize that the United States does not agree that the McCarran Amendment waives its sovereign immunity to payment of adjudication filing fees, I believe it is important that you understand the gravity of this matter. The Idaho Department of Water Resources is not in a position to assume the financial burden of [*sic*] the state of Idaho of accepting and processing federal claims absent the payment of filing fees.

Sincerely,
/s/ R. Keith Higginson
R. KEITH HIGGINSON
Director

cc: Clive Strong
David B. Shaw

MOTION FILED
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No. 92-190

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA,
Petitioner,

v.

STATE OF IDAHO, EX REL. DIRECTOR,
IDAHO DEPARTMENT OF WATER RESOURCES,
Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Idaho

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF OF AMICI CURIAE NEZ PERCE TRIBE, KLAMATH TRIBE AND TULE RIVER TRIBE IN SUPPORT OF THE PETITION OF THE UNITED STATES OF AMERICA

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On Petition For A Writ Of Certiorari To The Supreme Court Of Idaho

---

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE OF NEZ PERCE TRIBE, KLAMATH TRIBE AND TULE RIVER TRIBE IN SUPPORT OF UNITED STATES OF AMERICA

The Nez Perce Tribe, Klamath Tribe and Tule River Tribe respectfully request this Court to accept for filing the attached brief amici curiae. Respondent State of Idaho has refused to consent to the filing of this brief. The Court should accept this brief because it presents important factual information and argument describing the practical impact of the lower court's decision. The brief demonstrates how the rul-

ing of the Idaho Supreme Court will adversely affect the ability of the United States government to fulfill its trust responsibility to Indian tribes.

In its capacity as trustee, the United States intends to file substantial water right claims on behalf of the Nez Perce Tribe in Idaho's general stream adjudication of the Snake River Basin. Many of these claims will be for instream flows necessary to maintain fishing rights guaranteed by treaty between the Tribe and United States. Under Idaho law, the filing fees for these claims amount to a tremendous expense. The practical effect of the filing fee scheme will be to reduce the ability of the federal government to devote its scarce resources to the merits of the claims of Indian tribes. Ironically, the State of Idaho and other states (that will undoubtedly follow suit) will have a corresponding bonus added to their coffers for use in contesting federal and tribal claims.

While the United States' Petition demonstrates the error in the Idaho Supreme Court's legal analysis, it does not address the critical issue of the ruling's detrimental impact on Indian tribes in Idaho and the potential for harm to Indian tribes in other states. This Court should accept the attached brief for filing as it brings to the Court's attention important reasons for granting the United States' Petition.

Dated: September 8, 1992

Respectfully submitted,

/s/ ROBERT T. ANDERSON
ROBERT T. ANDERSON
Counsel of Record
Attorney for the Nez Perce Tribe

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92-190

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BRIEF AMICI CURIAE OF NEZ PERCE TRIBE, KLAMATH TRIBE AND TULE RIVER TRIBE IN SUPPORT OF UNITED STATES OF AMERICA

INTEREST OF AMICI

The Idaho Supreme Court's decision requiring the United States to pay a substantial portion of the costs of Idaho's Snake River Basin adjudication should be reviewed by this Court and reversed on the merits. As set out by the United States' Petition for a Writ of Certiorari, the decision is in direct conflict with this Court's construction of the McCarran Amendment, 43 U.S.C. § 666, and with this Court's law

regarding waivers of federal sovereign immunity. Those arguments need not be repeated here, but amici Indian tribes offer an additional reason for granting the Petition; to prevent the substantial harm that will be visited on the water rights of the Nez Perce Tribe and potentially on other Indian tribes, through the depletion of federal funds ear-marked for technical and legal work required to support the tribes' water rights claims.

Pursuant to the McCarran Amendment, the United States is subject to suit in state court for the determination of the "rights to the use of water of a river system." 43 U.S.C. § 666. Although the sovereign immunity of Indian tribes has not been waived, tribal water rights are held in trust by the United States and thus are subject to quantification in state court proceedings such as Idaho's. Congress did not intend the McCarran Amendment to authorize *federal funding* of state general stream adjudications. Indeed, not only are federal budgets for these adjudications rarely adequate to sustain the federal trustee's obligation to prove and defend tribal water rights; they are wholly inadequate to bear the added burden of millions of dollars of "filing fees" demanded by state water agencies to fund their adjudications. Federal funding of state adjudication proceedings through filing fees is particularly unfair when it is realized that most tribal water claims have been settled out of court without the necessity of extensive judicial proceedings. The Idaho Court's holding that the McCarran Amendment requires the United States to finance the adjudication will substantially impair the United States' ability to fulfill its trust obligation in these typically controversial cases by diminishing the

funds available to obtain the technical and legal studies necessary to support tribal water claims.

Under the "reserved rights" doctrine, tribes often have a priority date senior to all other water users in a basin. Great expense is incurred for work conducted by expert witnesses who document and testify to the historic, present, and future water needs of tribes. The end result is a decree binding on all water users subject to the adjudication. Prior decisions of this Court make it clear that tribes, and the United States on behalf of the tribes, will be afforded but one opportunity to advance and defend their claims—claims that must not only satisfy existing uses, but must also provide for tribes' future needs. The rule of law pronounced by the Idaho Supreme Court approves a mechanism by which states may not only finance their adjudications through the federal treasury, but also unfairly and adversely affect tribal rights.

Important federal rights are at issue in state court cases brought pursuant to the McCarran Amendment. As this Court noted in the course of holding that Indian reserved rights were subject to adjudication in state courts under the McCarran Amendment:

> State courts, as much as federal courts, have a solemn obligation to follow federal law. Moreover, *any state-court decision alleged to abridge Indian water rights protected by federal law can expect to receive, if brought for review before this Court, a particularized and exacting scrutiny* commensurate with the powerful federal interest in safeguarding those rights from state encroachment.

Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 571 (1983) (emphasis added). The Idaho filing fee scheme and the decision upholding it threaten the tribes' ability to obtain the technical and legal expertise demanded by water cases and hence threaten the substance of Indian reserved rights in Idaho and encourage other states to so hinder tribal rights. Accordingly, the United State's petition for review should be granted.

I. AS A PRACTICAL MATTER, THE DECISION OF THE IDAHO SUPREME COURT WILL SEVERELY UNDERMINE THE UNITED STATES' AND NEZ PERCE TRIBE'S ABILITY TO EFFECTIVELY ASSERT TRIBAL WATER RIGHT CLAIMS

The Nez Perce Tribe inhabits a reservation of approximately 750,000 acres in northern Idaho that was established pursuant to treaties with the United States in exchange for a cession of most of the Tribe's aboriginal territory. 12 Stat. 957 (June 11, 1855); 14 Stat. 647 (June 9, 1863). In addition to retaining a reservation for its exclusive use and occupancy, the Tribe expressly reserved fishing rights. 12 Stat. 957, art. III. This right has since been interpreted to provide a right of up to fifty percent of the available fish harvest. *Sohappy v. Smith*, 302 F. Supp. 899, 911 (D. Oregon 1969);[1] *see Washington v. Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

In general, when Indian tribes negotiated treaties with the United States they reserved enough water to fulfill the agricultural purpose underlying establishment of their reservations. *Winters v. United States*, 207 U.S. 564 (1908); *see, United States v. Winans*, 198 U.S. 371, 381 (1905). The same conclusions have been reached regarding the reservation of sufficient water to maintain treaty-protected fisheries. *See, e.g., Department of Ecology v. Acquavella*, No. 77-2-01484-5 *Memorandum Opinion* (Yakima Cty. Superior Court, May 22, 1990), *appeal docketed*, No. 57798-6 (Wash. S.Ct.) (treaty language identical to the Nez Perce); *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984); *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981).

Idaho commenced its general stream adjudication in 1987. For the past five years the Nez Perce Tribe has been working with the Bureau of Indian Affairs to develop the claims that will be made on behalf of the Tribe. Aside from expending significant amounts of attorney time, the United States has hired biologists, hydrologists, engineers, historians, anthropologists and economists to develop and justify the Tribe's claims. The cost of these services has run into the millions of dollars and the Bureau of Indian Affairs chronically has insufficient funding to perform all of the work and studies needed by the Tribe and the United States. In addition, the federal government provides the Tribe with limited funding to hire its own experts and attorneys to oversee and supplement the claims developed by the United States. Such oversight is absolutely essential given this Court's ruling in *Nevada v. United States*, 463 U.S. 110 (1983) that the United States is not held to the high fiduciary standards of a private trustee in water rights cases.[2]

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[1] A description of the lengthy history of this litigation is found in *United States v. Oregon*, 913 F.2d 576 (9th Cir. 1990).

[2] Here, as in *Nevada*, the government may assert claims on

If the Bureau of Indian Affairs is required to pay the exorbitant "filing fees" at issue in this case, the funds available to prepare for the merits of the case undoubtedly will be diminished. The removal of at least ten million dollars from the limited financial resources available to assert claims on behalf of the Tribe could sound the death knell for water rights necessary to support treaty fishing rights. It is not feasible for tribes simply to seek additional appropriations to cover the cost of filing fees. It is well known that Indian tribes are, among the minorities in this country, the most politically weak. History demonstrates the practical difficulty tribes have had in obtaining federal protection of their rights. As the National Water Commission stated in 1973, "In the history of the United States Government's treatment of Indian tribes, its failure to protect Indian water rights for use on the Reservations it set aside for them is one of the sorrier chapters." Nat'l Water Comm'n, Water Policies for the Future—Final Report to the President and to the Congress of the United States 475 (GPO, 1973).

Idaho's filing fee scheme also frustrates the overriding federal objective of settling Indian water cases, and precludes the United States from adequately preparing claims for litigation. *See* 55 Fed. Reg. 9223 (March 12, 1990) (announcing Executive Branch Policy of pursuing negotiated settlements of Indian water right claims). Under the Idaho scheme, the Nez Perce claims must be filed by late March of 1993. If the Bureau of Indian Affairs is compelled to pay the fees claimed by Idaho, it is doubtful that adequate financial

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behalf of other federal agencies that conflict with Nez Perce claims.

resources will remain to adequately prepare the Tribe's water right claims *and* commence negotiations. Rather, the limited resources of the Bureau of Indian Affairs will need to be conserved for litigation purposes.

II. THE DECISION OF THE IDAHO SUPREME COURT WILL LIKELY HAVE A DISASTROUS EFFECT ON OTHER TRIBES SUBJECT TO GENERAL STREAM ADJUDICATIONS IN STATE COURTS

In Oregon the United States is facing state administrative proceedings to quantify federal and, as the Klamath Tribe's trustee, tribal water rights in the Klamath River Basin Adjudication in southern Oregon. The existence of the tribal rights was declared in *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984), but the quantification was left to later state court proceedings. The tribal rights—including those to some 400 miles of streams—principally are for water to support treaty-protected fishing, hunting, and gathering activities. *Adair* at 1410. These water rights are essential to the survival of the Tribe since the various fish and wildlife species upon which the Tribe depends are themselves dependent on an adequate supply of water.

Oregon, like Idaho, asserts authority to exact "filing fees" from the United States, on pain of forfeiture of federal water rights, to "pay for the expenses of the [Water Resources] department" in registering and determining water rights claims. Or. Rev. Stat. §§ 539.081(4) and 539.210. The statutes are ambiguous as to the amount of fees for large federal water claims such as those for instream flows, wetlands, or lake

maintenance. *See* Or. Rev. Stat. § 539.081(1).[3] Oregon is experiencing sharp budget restrictions brought on by a ballot initiative capping and rolling back property taxes. The state is increasing its resort to "user fees" to finance many state agency activities. In this fiscal atmosphere there is little doubt that Oregon, following Idaho's lead, will interpret its "filing fee" statutes to exact sufficient fees from the United States to bankroll the state water agency. If Idaho is successful in collecting ten million dollars from the United States, Oregon likewise may structure its fee regime to exact fifteen to twenty million dollars, or perhaps even more. The harmful effect of such exorbitant fees on the water rights of the Klamath Tribe cannot be underestimated. Quantification of the Tribe's water rights involves a determination of the water needs of fish and wildlife. As with all tribal water claims this is a complex and expensive undertaking requiring hydrologic, biological, engineering, and other professional expertise. Even if fees are not exacted for non-consumptive tribal claims, the federal government will be forced to pay fees for claims made by the Forest Service and other agencies. As a practical matter this will diminish the amount of funding available to perfect tribal claims.

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[3] These fees were unsuccessfully challenged in *United States and Klamath Tribe v. State of Oregon, Dep't of Water Resources*, 774 F. Supp. 1568 (D. Or. 1991). The statute presently exempts the United States' claims for non-consumptive uses on behalf of Indian tribes from the fee schedule. Or. Rev. Stat. § 539.081(2). The state claims the right to charge the tribe fees for other reserved right claims. Based on the reasoning of *Tule v. Washington*, 315 U.S. 681 (1941), the district court rejected the state's argument as to the tribe, but the United States must pay fees for claims it makes on its own behalf.

No separate federal budget provision is made for filing fees. If the fees as eventually calculated by Oregon are of the same magnitude as those demanded by Idaho, the fees will be much larger than the annual federal budget available for proof and defense of the Tribe's water rights. Payment of the fees will reduce the already inadequate federal funds available. In the end, the ability of the United States and the Klamath Tribe to defend the Tribe's water rights will be compromised because of the State's exaction of "filing fees" from the United States.

The Tule River (Yokut) Indians inhabit a reservation established in 1873 by executive order and located in the foothills of the Sierra Nevada Mountains. I Kapp. 830-31 (GPO, 1904). Although the Tule River Indians have continuously used the waters of the South Fork Tule River, the Tribe's water rights have not been formally adjudicated. Indeed, most Indian tribes in California have not had their water rights adjudicated. Of the nearly 100 tribes located in California only five have adjudicated water rights.[4]

If allowed to stand, the Idaho Supreme Court's decision will likely have a serious, adverse impact on future water adjudications in California. It is a matter of common knowledge that the State of California currently is experiencing serious financial difficulties. Meanwhile, California has experienced drought conditions for five of the past seven years, resulting in increasing demands and pressures on its scarce water resources. It is quite likely that in the next few years

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[4] These are the Agua Caliente and the Morongo Reservations, which share a 1938 Decree, and the Cahuilla (1962), Greenville (1954), and the Grindstone (1930) Reservations.

proceedings will be initiated in California to quantify tribal reserved water rights to obtain a secure quantity and source of water. *See Colorado River Water Cons. Dist. v. United States*, 424 U.S. 800, 811 (1976) ("ubiquitious nature of Indian rights in the Southwest" calls for adjudication of such rights). California's current adjudication system only charges a nominal flat fee for filing a notice of water claim,[5] and equitably apportions the costs and expenses of the adjudication against the parties.[6] In light of both the budget and water crises in California, as well as impending pressure to adjudicate Indian water rights, California will be hard pressed not to adopt a statute designed to exact from the United States the bulk of the cost of water adjudication proceedings to quantify tribal water rights.

CONCLUSION

Idaho's attempt to force the United States finance its general stream adjudication is inconsistent with the meaning of the McCarran Amendment. Surely Congress could not have intended that the United States pay the bulk of the cost of state court general stream adjudications when it adopted the McCarran Amendment. If this Court does not grant the United States' Petition, the Nez Perce Tribe will suffer direct and immediate adverse consequences. Moreover, other western states will undoubtedly follow Idaho's lead and thereby further impair the federal government's

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[5] *See* Cal. Water Code § 2850 ("at the time of submission of proofs [of claim], the Board shall collect from each claimant a fee of ten dollars ($10.00) for each proof filed by the claimant").

[6] *See* Cal. Water Code §§ 2500 - 2852 (expenses in statutory adjudications).

ability to fulfill its trust obligation to Indian tribes. Because the Idaho Supreme Court incorrectly interpreted the law and because that ruling will have great local and nation-wide impact, the Unit
ed States' Petition should be granted.

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No. 92-190

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF IDAHO, EX REL. DIRECTOR,
IDAHO DEPARTMENT OF WATER RESOURCES

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF IDAHO

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

The McCarran Amendment allows joinder of the United States as a defendant in comprehensive water right adjudication suits, but specifically provides that "no judgment for costs shall be entered against the United States in any such suit." 43 U.S.C. 666(a). The question presented is:

Whether, when a State joins the United States as a defendant in such a suit, the State may refuse to recognize the United States' water right claims unless the United States pays "filing fees" to finance the State's costs in the adjudication.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Idaho Power Company, Twin Falls Canal Company, and North Side Canal Company participated as respondents in the Idaho Supreme Court.

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STATE OF IDAHO, EX REL. DIRECTOR,
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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Idaho Supreme Court (Pet. App. 1a-40a) is reported at 832 P.2d 289. The judgment of the district court (Pet. App. 41a-44a) and the memorandum decisions of the district court (Pet. App. 45a-80a, 81a-89a, 90a-115a) are unreported.

JURISDICTION

The judgment of the Idaho Supreme Court was entered on March 30, 1992. On June 22, 1992, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including July 28, 1992, and the petition was filed on that date. This Court granted the petition for a writ of certiorari on October 19, 1992. The jurisdiction of this Court rests upon 28 U.S.C. 1257(a).

STATUTORY PROVISIONS INVOLVED

The McCarran Amendment provides in relevant part:

> § 666. Suits for adjudication of water rights
>
> (a) Joinder of United States as defendant; costs
>
> Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

43 U.S.C. 666(a).

Section 42-1414 of the Idaho Code provides in relevant part:

> § 42-1414. Fees for filing notice of claim.—In order to provide an adequate and equitable cost-sharing formula for financing the costs of adjudicating water rights the department of water resources shall accept no notice of claim * * *

> unless such notice of claim is submitted with a filing fee based upon the fee schedule set forth below. Failure to pay the variable water use fee in accordance with the timetable provided shall be cause for the department to reject and return the notice of claim to the claimant. * * *
>
> (1) Flat fee per claim filed:
>
> (a) Claims for domestic and/or stockwatering rights $25.00
>
> (b) Claims for all other rights $50.00
>
> (2) Additional variable water use fee for claims filed based upon acreage, power generating capacity, c.f.s., or equivalent volume of water:
>
> (a) Irrigation use (one fee irrespective of number of claims: .....$1.00 per-acre
>
> (b) Power: .....$3.50 per kilowatt of capacity (manufacturer's nameplate rating)
>
> (c) Aquaculture: .....$10.00 per c.f.s.
>
> (d) Municipal, industrial, commercial, mining, heating, cooling: .....$100.00 per c.f.s.
>
> (e) Public instream flow, public lake level maintenance, wildlife: .....$100.00 per c.f.s.
>
> (3) * * * All fees collected by the department pursuant to this section shall be placed in the water resources adjudication account established in section 42-1777, Idaho Code.

Idaho Code § 42-1414 (1990).

STATEMENT

The McCarran Amendment allows a State to join the United States as a defendant in a suit for adjudication of rights to the use of water of a river system

or other source, but bars entry of any "judgment for costs" against the United States in such a suit. 43 U.S.C. 666(a). This case arises from the State of Idaho's joinder of the United States as a defendant, pursuant to the McCarran Amendment, in a suit for the comprehensive adjudication of water rights in the Snake River basin. The United States seeks reversal of a decision of the Idaho Supreme Court affirming a state district court's determination that Idaho may refuse to adjudicate the United States' water right claims unless the United States pays "filing fees" to finance the State's costs in the adjudication.

1. Congress enacted the McCarran Amendment to facilitate the comprehensive judicial determination of rights to the use of water of a river system or other source. Enacted in 1952, the McCarran Amendment contains three principal provisions respecting the United States' waiver of sovereign immunity. First, the Amendment provides that the United States may be joined as a defendant in any suit

> (1) for the adjudication of rights to the use of water of a river system or other source, or
>
> (2) for the administration of such rights,

where

> it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit.

43 U.S.C. 666(a). Second, the McCarran Amendment limits the United States' assertion of sovereignty as a defense on the merits, stating that when the

United States has been properly joined in the circumstances described above, the United States shall

> be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty.

43 U.S.C. 666(a). Third, the McCarran Amendment states that the United States "shall be subject to the judgments, orders, and decrees of the court having jurisdiction" to the same extent "as a private individual under like circumstances:"

> *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

43 U.S.C. 666(a).

At the time Congress enacted the McCarran Amendment, Idaho used judgments for costs to finance the State's expenses in general water right adjudications. See Idaho Code § 42-1401 (1948) (Idaho Exh. 247). Idaho's Department of Reclamation would make an examination of the water system and submit an itemized, verified statement of its expenses to the state auditor, who would present the statement to the state board of examiners. Expenses approved by the board would be paid out of general revenues. The state auditor would then certify those amounts to the court for inclusion as "part of the costs and disbursements in said cause." Idaho Code § 42-1401 (1948) (Idaho Exh. 247). At the time of entry of final judgment, the court would

> adjudge and determine the proportionate amount of such cost of examination and survey to be paid by each of the parties to said suit * * *.

Idaho Code § 42-1401 (1948) (Idaho Exh. 247). The McCarran Amendment's "costs proviso" expressly retained the United States' immunity from assessment under that financing mechanism.[1]

2. For many years, the State of Idaho and the Idaho Power Company have been engaged in a dispute over utilization of water from the Snake River. See *Idaho Power Co.* v. *State*, 661 P.2d 741 (Idaho 1983). To resolve that longstanding dispute, the State of Idaho and the Idaho Power Company agreed to propose and support legislation authorizing a general adjudication of water rights in the Snake River basin. In 1985 and 1986, the Idaho Legislature enacted the proposed legislation, which provides that "the director of the department of water resources shall petition the district court to commence an adjudication within the terms of the McCarran amendment." Idaho Code § 42-1406A(1) (1990). See generally *In re Snake River Basin Water System*, 764 P.2d 78, 80-81 (Idaho 1988), cert. denied, 490 U.S. 1005 (1989).

In addition to requiring the Director to petition the district court to commence the adjudication, the

[1] The McCarran Amendment had the same effect in other western States, including Senator McCarran's own State of Nevada, which also used judgments for costs to recoup the State's expenses in conducting general water right adjudications. See 1943 Cal. Stat. 1631-1632 (Cal. Water Code §§ 2040-2043) (Idaho Exh. 245); Nev. Comp. Laws § 7930 (Bender-Moss 1929) (Idaho Exhs. 252-256); N.M. Stat. § 77-406 (1941) (Idaho Exhs. 257-258); N.D. Rev. Code § 61-0317 (1943) (Idaho Exh. 259); Okla. Stat. § 82-13 (West 1951) (Idaho Exh. 260); Or. Comp. Laws Ann. § 116-822 (1940) (Idaho Exhs. 261-262); Utah Code Ann. § 100-4-20 (1943) (Idaho Exh. 265a-b); Wash. Rev. Stat. § 7371 (Remington 1932) (Idaho Exhs. 266-267).

revised Idaho adjudication code specifies other responsibilities to be performed by the Director. Those responsibilities, which are essentially the same as those performed by the Director before the statute was amended, see Tr. 612-618, include: (1) service of notice of the court's order commencing the adjudication, including a form prepared by the Director for claimants to file for each claimed water right, Idaho Code §§ 42-1408A, 42-1409 (1990); (2) examination of both the water system and water right claims, as well as preparation of maps of the water system, which shall be available "for the purpose of assisting any claimant in preparing and filing claims and objections to the director's report," *id.* § 42-1410; and (3) preparation of a "report on the water system," containing (a) the Director's determination with respect to all claimed water rights acquired under state law, (b) an abstract of the notices of claim and negotiated agreements for federal reserved water rights, and (c) the notices of claim and negotiated agreements, *id.* § 42-1411. Any party may file an objection to the Director's report, and the Director has the further responsibility of responding to any objection filed. *Id.* § 42-1412. The Director's report, any objections, the responses to objections, and the notices of claim and negotiated agreements "shall constitute the pleadings" before the district court. *Ibid.* In addition to performing the statutory duties established by the state legislation, the Director purports also to provide assistance at no charge to claimants who request help in filing a notice of claim form, see Tr. 1178-1179, and provides access to the State's computer database at an additional charge to a claimant, see Tr. 1184-1185.

The 1985 and 1986 amendments to Idaho's adjudication code also altered the State's methods for financing its costs in water right adjudications. Specifically, they state that the Director of Idaho's Department of Water Resources shall not accept a "notice of claim" from any water right claimant unless the notice is accompanied by a filing fee in accordance with a fee schedule set out in the statute. Idaho Code § 42-1414 (1990). "Failure to pay the variable water use fee in accordance with the timetable provided shall be cause for the department to reject and return the notice of claim to the claimant." *Ibid.*[2]

The monies collected as filing fees are "placed in the water resources adjudication account established in section 42-1777." Idaho Code § 42-1414(3) (1990). The Idaho Legislature annually appropriates the filing fees placed in that account "to pay the costs of the [Department of Water Resources] attributable to general water rights adjudications" and "to pay for judicial expenses directly relating to the Snake river adjudication." *Id.* § 42-1777(1) and (2). Idaho uses the funds placed in the adjudication account to pay not only the State's costs of processing, filing, and reporting on water right claims, see,

[2] Idaho first imposed filing fees in 1971, but the fees imposed between 1971 and 1985 were nominal in amount. A claimant paid a fixed fee of $10 if the claim was evidenced by a prior decree, permit or license, or paid a fee equal to the fee charged for obtaining a permit if the right claimed was created solely by the application of water to beneficial use. See Idaho Code § 42-221 (1977). The revised filing fee provision at issue here both changed the manner of financing the State's adjudication costs and substantially increased the charges assessed against claimants.

e.g., R. 414-415, 421-423, but also various litigation costs that the State incurs in challenging such claims, including attorney salaries and expenses for investigations, evidentiary development, witnesses, and service of process. See, *e.g.*, U.S. Exh. 3006, at 2-10, 51-55; R. 423-424; Tr. 376, 378-381, 547-553, 595. The State has projected that it will charge $2.1 million in attorney salaries alone to the adjudication account. See Tr. 417, 545, 546.

Although the Idaho statute describes the fee structure as providing an "equitable cost-sharing formula for financing the costs of adjudicating water rights," Idaho Code § 42-1414 (1990), the variable filing fees fall more heavily upon sovereign claimants, such as the United States and Indian Tribes, that are entitled to file notices of claims to instream flows.[3] The United States has estimated that the Idaho statute would require that federal agencies pay more than $10 million in fees in the Snake River Basin adjudication, and the bulk of those fees would be required for federal reserved water right claims, as distinguished from claims to water rights acquired under state law. See, *e.g.*, R. 246-262, 265-266, 271-287.

3. On June 17, 1987, the Director of the Idaho Department of Water Resources filed a petition in the District Court of the Fifth Judicial District nam-

[3] Agricultural users pay the lowest variable fee—one dollar per acre irrigated, regardless of the amount of water diverted or consumed. Hydropower users are assessed a comparatively low fee of $3.50 per kilowatt of capacity, while entities claiming water for aquaculture are charged $10 per cfs (cubic foot per second). Entities claiming water for municipal, industrial, or commercial use and public entities seeking to maintain minimum instream flows are charged ten times that amount: $100 per cfs. See Idaho Code § 42-1414 (1990).

ing the United States and all other water users in the Snake River basin as defendants. The district court formally commenced the adjudication by order dated November 19, 1987, see *In re Snake River Basin Water System*, *supra* (affirming the commencement order), and the Director has received notices of water right claims in accordance with Idaho law. See Idaho Code §§ 42-1408A to 42-1410 (1990). The district court established a schedule under which the United States' claims are filed on an agency-by-agency basis through March 1993.

The United States has attempted to submit its notices of claims according to the court's schedule, but the Director has refused to file any notices not accompanied by filing fees. See Tr. 1180. On June 30, 1989, the United States filed a petition for a writ of mandamus to compel the Director to accept the United States' notices without filing fees. The petition asserted, *inter alia*, that the Director is under a duty to file the notices without accompanying filing fees because the McCarran Amendment does not waive the United States' immunity from assessment of fees in general water right adjudications. The district court entered a judgment denying the petition for a writ of mandamus after issuing a series of memorandum decisions rejecting the United States' specific contentions. Pet. App. 41a-44a, 45a-80a, 81a-89a, 90a-115a.

The district court's second decision specifically rejected the United States' argument that the McCarran Amendment does not waive federal sovereign immunity from payment of the State's filing fees. The court stated that "[t]he ordinary, contemporary and common meaning of the language of *McCarran* is that Congress waived *all rights* to assert any facet

of sovereign immunity in a general [water right] adjudication * * * which is being conducted in accordance with state law." Pet. App. 86a (emphasis in original). The court concluded that the McCarran Amendment's "costs proviso" supported its result, reasoning that the Amendment "specifically exempts the United States from paying any 'judgment for costs,' " but contains "[n]o exception for filing fees." *Id.* at 88a.

4. The Idaho Supreme Court affirmed in a sharply divided decision. Pet. App. 1a-40a. The three-judge majority concluded that the McCarran Amendment contains a clear and unambiguous waiver of federal sovereign immunity from filing fees, stating that the "language selection" in the Amendment "clearly subjects the United States to all laws concerning an 'adjudication.' " *Id.* at 12a. The majority rejected constructions of the Amendment other than its own, stating that "[t]he employment of alternative statutory construction techniques is not required in analyzing 43 U.S.C. § 666(a) unless it is for the purpose of attempting to strain the plain statutory language to reach some pre-ordained result." *Ibid.*

The majority found no merit in the United States' contention that the McCarran Amendment's costs proviso demonstrates Congress's intent that the United States would not be subject to state filing fees. The majority concluded that the McCarran Amendment protects the United States only from a judgment for costs and that "[f]ees do not come within the term costs" because "costs are the charges that a party may recover from the opponent," while "fees are compensation paid to an officer, such as the court, for services rendered in the course of litigation." Pet. App. 14a. Additionally, the majority

viewed the costs covered by the State's filing fees as not "actually 'costs' incurred by a party litigant," because "[t]he director is really a disinterested party" who acts in the adjudication in a position "analogous to the 'stakeholder' in an interpleader action." *Id.* at 15a. In the majority's view, "the United States is 'a water applicant' seeking affirmative relief from the state and not a 'defendant.'" *Id.* at 16a. Justice Bistline wrote a separate concurring opinion in which he largely rejected the doctrine of federal sovereign immunity, but also stated that he was "not persuaded of any error in [the majority's] analysis." *Id.* at 26a.

Justices Johnson and Boyle wrote separate dissents, concluding that the McCarran Amendment does not waive the United States' immunity from payment of filing fees. See Pet. App. 28a-29a, 29a-40a. Justice Johnson rejected the majority's distinction between filing fees and costs, observing that "[t]he 'filing fees' the state seeks to charge the United States are not the usual modest fees for filing pleadings in a lawsuit." *Id.* at 28a. Rather, the United States was being required "to fund involuntarily a significant part of the cost of the SRBA [Snake River Basin Adjudication]," because the adjudication itself was "occasioned" by the settlement of a dispute between the State and the Idaho Power Company and "[t]he United States is just along for the ride, pursuant to the McCarran Amendment." *Ibid.* Justice Johnson concluded:

> By the McCarran Amendment, the United States consented to joinder as a defendant in a "general adjudication." * * * The plain reading of the McCarran Amendment indicates that the United States did not waive its sovereign immunity to the payment of costs. * * * These "filing fees" are nothing more nor less than the State's costs for conducting the SRBA. By the McCarran Amendment, the United States waived its sovereign immunity only so far as being joined as a defendant, not so far as involuntarily paying the costs of the litigation.

Id. at 29a.

The other dissenter, Justice Boyle, objected that the majority's decision was inconsistent with "the Supreme Court's recent pronouncements" concerning waivers of sovereign immunity. Pet. App. 30a. He explained that a waiver of sovereign immunity "must be grounded exclusively upon the statutory text" and must be "unequivocal." *Ibid.* (citing *United States* v. *Nordic Village, Inc.*, 112 S. Ct. 1011 (1992)). Because it is "at least 'plausible'" to construe the McCarran Amendment as retaining the United States' immunity from state filing fees, Pet. App. 38a, Justice Boyle concluded that the Amendment does not provide the requisite "unequivocal statutory waiver," *id.* at 40a.[4]

SUMMARY OF ARGUMENT

The Idaho Supreme Court erred in holding that the McCarran Amendment waives federal sovereign immunity from Idaho's requirement that water right claimants pay "filing fees" to finance the State's costs in the water right adjudication. This Court's decisions make plain that the United States retains

[4] After the state supreme court's decision, the district court issued an order requiring the Director to accept the United States' claims without payment of fees, pending final resolution of the controversy.

its sovereign immunity except to the extent that Congress has unambiguously waived it. Such a waiver must be stated in the statutory text in clear and unmistakable terms, particularly where the asserted waiver would subject the United States to monetary liability. See, *e.g.*, *United States Dep't of Energy* v. *Ohio*, 112 S. Ct. 1627, 1633, 1639-1640 (1992); *Library of Congress* v. *Shaw*, 478 U.S. 310, 314-315, 318-321 (1986). Although the McCarran Amendment unambiguously allows a State to join the United States as a defendant in comprehensive water right adjudication suits in state court, it does not allow the State, in addition, to exact payment from the United States for the cost of such suits.

None of the McCarran Amendment's provisions contains a waiver of federal sovereign immunity from filing fees in general water right adjudications. The first provision, which gives Congress's consent "to join the United States as a defendant," allows the State to sue the United States, but it does not grant the State any right to assess the United States with fees for the State's costs of adjudication. The second provision, which limits what defenses the United States has the "right to plead," is also unavailing. That provision waives the federal government's right to raise a legal defense of immunity from state law requirements when it asserts water rights derived under the State's water appropriation practices, but it is silent as to a State's right to exact fees from the United States as a condition precedent to asserting a legal claim. The third provision, which bars a State from imposing a "judgment for costs" against the United States, affirmatively demonstrates that Congress did not intend to permit the States to shift the costs of adjudications

from the States to the federal government. Indeed, this Court has repeatedly required that Congress provide a separate waiver to eliminate the United States' immunity for matters ancillary to the merits of a lawsuit, such as attorney's fees, interest, and costs. See *Library of Congress*, 478 U.S. at 314-315. The McCarran Amendment includes no such waiver of immunity from filing fees, regardless of whether they are denominated by the State as "fees" or "costs."

ARGUMENT

THE UNITED STATES IS IMMUNE FROM THE STATE OF IDAHO'S REQUIREMENT THAT WATER RIGHT CLAIMANTS PAY "FILING FEES" TO FINANCE THE STATE'S COSTS IN A WATER RIGHT ADJUDICATION

A. Under Well Settled Principles, The State Must Demonstrate That The McCarran Amendment Contains A Clear And Unambiguous Waiver Of The United States' Sovereign Immunity From Filing Fees

The Idaho Supreme Court correctly stated the "fundamental principle" that "the United States is immune from suit unless it consents to be sued." Pet. App. 6a. *E.g.*, *Loeffler* v. *Frank*, 486 U.S. 549, 554 (1988); *United States* v. *Mitchell*, 463 U.S 206, 212 (1983); *United States* v. *King*, 395 U.S. 1, 4 (1969); *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941). Congress alone may consent to suit, and its consent—which constitutes a waiver of sovereign immunity—must be "unequivocally expressed." *United States* v. *Nordic Village, Inc.*, 112 S. Ct. 1011, 1014 (1992); *Irwin* v. *Veterans Admin.*, 111 S. Ct. 453, 457 (1990). The waiver must be "clear and unambiguous." See *Hancock* v. *Train*, 426 U.S. 167, 179 (1976); *EPA* v. *California*, 426 U.S. 200,

211 (1976). It cannot be implied, assumed, or based on speculation. *United States Dep't of Energy* v. *Ohio*, 112 S. Ct. 1627, 1633 (1992); *Block* v. *North Dakota*, 461 U.S. 273, 280 (1983); *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980); *United States* v. *King*, 395 U.S. at 4.

Congress need not, of course, waive *in toto* the United States' immunity from suit; it may elect to provide only "a partial waiver of sovereign immunity." *Ardestani* v. *INS*, 112 S. Ct. 515, 520 (1991). In those circumstances, the waiver "must be 'construed strictly in favor of the sovereign'" and not enlarged "beyond what the language requires." *Ohio*, 112 S. Ct. at 1633; *Nordic Village*, 112 S. Ct. at 1015; see also *Ardestani*, 112 S. Ct. at 520. For example, a congressional waiver of federal sovereign immunity does not subject the United States to *monetary* liability—particularly liability for fees and costs associated with the adjudication itself—unless that consequence is specifically set out in the statutory text. See *Ohio*, *supra*; *Nordic Village*, *supra*; *Library of Congress*, *supra*.

In *Ohio*, the Court concluded that a provision of the Resource Conservation and Recovery Act (RCRA) that subjects the United States to "all Federal, State, interstate, and local requirements, both substantive and procedural[,] * * * in the same manner, and to the same extent, as any person is subject to such requirements," 42 U.S.C. 6961, is not "an explicit and unambiguous waiver of federal sovereign immunity from punitive fines." *Ohio*, 112 S. Ct. at 1639. The Court explained:

> We * * * agree with the Tenth Circuit that "all . . . requirements" "can reasonably be interpreted as including substantive standards and the means for implementing those standards, but excluding punitive measures." *Mitzelfelt v. Department of Air Force*, 903 F.2d 1293, 1295 (CA10 1990).

Id. at 1639-1640.

Similarly, in *Nordic Village*, the Court rejected a claim that Congress had waived federal immunity from monetary liability in Section 106(c) of the Bankruptcy Code. 11 U.S.C. 106(c). The Court found that Section 106(c) could be "plausibl[y]" construed not to reach monetary liability, which "is enough to establish that a reading imposing monetary liability on the Government is not 'unambiguous' and therefore should not be adopted." *Nordic Village*, 112 S. Ct. at 1016. See also, *e.g.*, *Library of Congress*, 478 U.S. at 318-321 (federal statute subjecting United States to "costs the same as a private person" including "a reasonable attorney's fee as part of the costs" did not subject United States to payment of interest on attorney's fees); *Missouri Pac. R.R.* v. *Ault*, 256 U.S. 554, 563 (1921) (federal statute subjecting carriers under federal control to "all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law," did not subject federal carrier to monetary penalties authorized by state statute).

As Justice Boyle pointed out in dissent, although the Idaho Supreme Court purported to recognize those principles, its decision is flatly inconsistent with them. The court correctly identified the McCarran Amendment as the source of the United States' consent to suit in this case, but it failed to come to grips with the precise language of the statute and the limited scope of the waiver, which simply do not extend to monetary liability for fees and costs.

B. The McCarran Amendment Does Not Waive The United States' Sovereign Immunity From Assessment Of Filing Fees In General Water Right Adjudications

The McCarran Amendment affects the United States' sovereign immunity in three respects. The first provision of the Amendment (the "joinder provision") allows joinder of the United States as a defendant in suits for the comprehensive adjudication of water rights if it appears that the United States is the owner of or is in the process of acquiring water rights "by appropriation under State law, by purchase, by exchange, or otherwise." 43 U.S.C. 666(a). The second provision (the "pleading provision") states that "[t]he United States, when a party to any such suit, shall * * * be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty." 43 U.S.C. 666(a). The third provision (the "judgments provision") subjects the United States to judgments and orders of the court having jurisdiction, subject to the condition (the "costs proviso") that "no judgment for costs shall be entered against the United States in any such suit." 43 U.S.C. 666(a). Those three provisions specifically curtail the United States' immunity in certain important respects, but they contain no express waiver of the United States' immunity from assessment of filing fees.

1. The Idaho Supreme Court mistakenly determined that a clear and unambiguous waiver of the United States' immunity from filing fees could be found in the McCarran Amendment's joinder provision, which allows a State "to join the United States as a defendant in any suit" for the general adjudication of water rights. 43 U.S.C. 666(a). The court

construed that language as a federal waiver of immunity from all state laws "necessary to carry out these types of suits." Pet. App. 11a. The State of Idaho, however, has disavowed that rationale. The State has acknowledged in this Court that the joinder provision by itself cannot suffice as a waiver of sovereign immunity from filing fees:

> Congress realized that merely consenting to joinder of the United States in an adjudication "suit" did not go far enough. * * * Further consent was needed from Congress, beyond simply joining the United States in such suits, to require the United States to comply with these special adjudication requirements. See, *e.g.*, *Blatchford* v. *Native Village of Noatak*, 111 S. Ct. 2578, at 2585 n.4 (1991).

Idaho Br. in Opp. 15.

We, of course, agree. The joinder provision allows the State to name the United States as a defendant in the suit and thereby subject the United States (upon receipt of legally adequate service) to the court's jurisdiction. But the joinder provision does not suffice as a complete waiver of immunity from all state laws that a state court might deem "necessary" to "carry out these types of suits." Pet. App. 11a. If that were so, Congress would have said so, and it would not have bothered to draft the McCarran Amendment in the precisely drawn terms contained in the joinder provision and the provisions that follow. See *Nordic Village*, 112 S. Ct. at 1015 (interpreting a waiver provision to "avoid[] eclipsing the carefully drawn limitations" contained in other provisions).

The McCarran Amendment's joinder provision serves an important but limited function. Prior to enactment of the McCarran Amendment, the United States could avoid joinder in a general adjudication of water rights by simply invoking its immunity from suit, and could stand aside while the relative rights of all other users on a river system were adjudicated. See S. Rep. No. 755, 82d Cong., 1st Sess. 5-6, 9 (1951). Under the McCarran Amendment's joinder provision, a plaintiff who satisfies the statutory criteria may now compel the United States to participate in the general adjudication suit.[5] But the mere fact that Congress has conditionally consented to joinder of the United States as a defendant on the merits does not mean that Congress has implicitly waived the United States' immunity to any state law—especially the filing fee requirement here—that a state court might determine is "necessary to carry out these types of suits." Pet. App. 11a.

The Idaho Supreme Court justified its expansive interpretation of the joinder provision on the rationale that "[t]o hold otherwise would allow the United States to plead immunity from those procedural rules * * * that the United States found inconvenient or objectionable." Pet. App. 11a. The United States, however, *should* be allowed to assert sovereign immunity from application of any procedural or other

[5] The plaintiff must show that (1) the suit is for the "adjudication of rights to the use of water of a river system or other source" or for the "administration of such rights"; (2) it appears that the United States is the owner of or is in the process of acquiring water rights "by appropriation under State law, by purchase, by exchange, or otherwise"; and (3) the United States "is a necessary party to such suit." 43 U.S.C. 666(a).

rules that fall outside the bounds of the congressional waiver. The fact that the United States may assert its sovereign immunity to "objectionable" procedural rules—state rules that trench upon important federal interests without the consent of Congress—does not justify the Idaho Supreme Court's wholesale obliteration of the sovereign immunity defense.

The Idaho Supreme Court's conclusion that the joinder provision subjects the United States to filing fees is especially implausible, because under traditional judicial practice, it is the plaintiff initiating the action—rather than the defendant—who pays a nominal filing fee for invoking the jurisdiction of the court.[6] Moreover, when the McCarran Amendment was enacted, the United States generally was immune from *any* method of cost-shifting in litigation, whether by entry of a judgment for costs or by otherwise requiring litigants to pay expenses, attorney's fees, or interest. See *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 20-21 (1926) (recognizing United States' "sovereign prerogative not to pay costs"); accord *The Antelope*, 25 U.S. (12 Wheat.) 546, 550 (1827).[7] No reason exists for believing that

[6] See, *e.g.*, 28 U.S.C. 1914(a) (requiring "the parties instituting any civil action * * * to pay a filing fee of $120"); see also 28 U.S.C. 1914(a) (1952) (requiring "the parties instituting any civil action * * * to pay a filing fee of $15"). Significantly, when the United States is a plaintiff in the federal courts, it does not pay filing fees. See 28 U.S.C. 1913 note (United States not subject to filing fees in courts of appeals); 28 U.S.C. 1914 note (United States not subject to filing fees in district courts); 28 U.S.C. 1930 note (United States not subject to filing fees in bankruptcy proceedings).

[7] See also, *e.g.*, *Library of Congress*, 478 U.S. at 314-317 (describing United States' traditional immunity from

Congress intended that the McCarran Amendment's joinder provision would implicitly authorize States to burden the federal treasury with extraordinary, multi-million dollar fee assessments like the ones Idaho seeks to impose here. To the contrary, in light of the settled principle that only an express waiver will suffice, if Congress had intended to waive the United States' longstanding immunity from costs and fees, it would have done so explicitly. See *Ohio*, 112 S. Ct. at 1633 (Congress is presumed to be aware of the "common rule" that "any waiver of the National Government's sovereign immunity must be unequivocal").[8]

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interest assessments); *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685 (1983) ("Except to the extent it has waived its immunity, the Government is immune from claims for attorney's fees."); Fed. R. Civ. P. 54(d) ("costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law").

[8] For example, Congress has enacted a special statute, first in 1966 (Act of July 18, 1966, Pub. L. No. 89-507, 80 Stat. 308), and now embodied in the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412, that grants federal courts strictly circumscribed power to assess the United States with court costs and attorney's fees in civil litigation. Idaho's filing fee requirement goes well beyond what Congress has allowed under EAJA. The Idaho statute assesses litigation expenses in excess of those permitted by EAJA, see 28 U.S.C. 2412(a) and 28 U.S.C. 1920, and requires payment at the *outset* of litigation, regardless of which party ultimately prevails. Moreover, the filing fees collected under the Idaho statute will be used in significant part to pay the litigation expenses of the State, which instituted this suit through its Director of the Department of Water Resources, and which, through the Director, may oppose any and perhaps all of the United States' claims. By contrast, in EAJA, Congress consented to payment of attorney's fees only to a prevailing party

Even if we assume that Congress implicitly intended to waive the United States' immunity as to any "necessary" state law, Idaho's filing fee assessments are in no sense "necessary" to carry out a water right adjudication. Pet. App. 11a. Idaho's fee assessment scheme is simply the State's most recently devised method for financing its expenses in water right adjudication suits, supplanting the State's prior system of paying its expenses through the use of general revenues or judgments for costs. See pp. 5-6, 8, *supra*. To be sure, the State must shoulder a greater financial burden in conducting general water right adjudications in the absence of revenues that the United States would provide through filing fee payments. But the mere fact that the State would prefer that the United States help finance the adjudication does not make filing fee assessments "necessary to carry out these types of suits." Pet. App. 11a. See *Hancock* v. *Train*, 426 U.S. at 199 (noting that Congress may limit its waiver of sovereign immunity in ways that leave in place obstacles to a State's desired method of administering a program).

2. The Idaho Supreme Court also erred in concluding that a clear waiver could be found in the McCarran Amendment's pleading provision, which states that when the United States is properly joined, it shall "be deemed to have waived any right to plead that the State laws are inapplicable." 43 U.S.C. 666(a). The Idaho court gave that provision the same

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(and only if the position of the United States was not substantially justified), see 28 U.S.C. 2412(d)(1)(A), and declined to render a State eligible for fees. See 28 U.S.C. 2412(d)(2)(B). Finally, Congress declined in EAJA to permit any assessment of fees and costs against the United States in state court.

interpretation that it gave to the joinder provision—*i.e.*, that it constitutes a federal waiver of immunity to the application of "all laws concerning an 'adjudication.'" Pet. App. 12a. Under the court's theory, a State may subject the United States to any requirement—monetary or otherwise—that relates to "a suit for adjudication or administration." *Ibid.*

The Idaho Supreme Court's interpretation pays no heed to the McCarran Amendment's language. The pleading provision explicitly provides that the United States shall be "deemed to have waived any right to plead that *the* State laws are inapplicable." 43 U.S.C. 666(a) (emphasis added). By placing the definite article "the" before "State laws," Congress made clear that the term "State laws" refers to a particular set of laws—namely, the body of state law identified in the immediately preceding sentence. As we have explained, the joinder provision subjects the United States to suit where, *inter alia*, it appears that the United States is the owner of, or is in the process of acquiring, water rights "by appropriation under State law." 43 U.S.C. 666(a). The "State law" referred to in the joinder provision and "the state laws" referred to in the pleading provision are one and the same: they are the body of substantive state laws governing "acqui[sition of] water rights by appropriation." 43 U.S.C. 666(a).

The Idaho Supreme Court's contrary construction violates "the settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect." *Nordic Village*, 112 S. Ct. at 1015. See *United States* v. *Menasche*, 348 U.S. 528, 538-539 (1955). Indeed, the Idaho court's interpretation makes the McCarran Amendment's joinder and

pleading provisions entirely redundant, because in its view, both serve as universal waivers of immunity from all state laws concerning an adjudication. Under our interpretation, by contrast, the joinder provision and the pleading provision each have a distinct meaning and operative effect. The joinder provision subjects the United States to participation as a defendant in a suit for the general adjudication of water rights if (among other things) it appears that the United States has acquired or is acquiring water rights by appropriation under state law. The pleading provision prevents the United States from relying on its "sovereignty" to excuse a failure by the federal government to adhere to substantive state law requirements for acquiring those rights. Both provisions are important, but neither prevents the United States from asserting its immunity from *other* state law requirements, including state statutes assessing fees and costs in litigating those rights.[9]

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[9] The State of Idaho unsuccessfully argued below that the qualifying phrase of the joinder provision—"where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit," 42 U.S.C. 666(a)—does not apply to the adjudication suits described in clause (1) of the sentence. Idaho contended that the qualifying phrase should instead apply only to its immediate antecedent, the administration suits described in clause (2). Justice Douglas's opinion for the Court in *United States* v. *District Court for the County of Eagle*, 401 U.S. 520 (1971), suggested such a reading, stating that the language following clause (2) "does not qualify § 666(a)(1), for (1) and (2) are separated by an 'or.'" 401 U.S. at 524. But that statement was merely dictum not essential to the Court's holding. See *ibid.* ("Yet even if 'or' be read as 'and,' we see no difficulty with Colo-

The Idaho court characterized our "statutory construction techniques" (Pet. App. 12a)—specifically our focus on the McCarran Amendment's use of parallel language in the joinder and pleading provisions—as an attempt to "strain the plain statutory language to reach some pre-ordained result." Pet. App. 12a. Our "statutory construction techniques,"

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rado's position."). The Idaho court wisely chose not to rely on that dictum. Justice Douglas stated no rule of grammar or statutory construction under which the use of "or" between two clauses necessarily bars application to the first clause of qualifying language that follows the second clause. He merely suggested that "or" has that effect but "and" would not. *Ibid.*

Indeed, Justice Douglas's dictum is inconsistent with the familiar rule that where (as here) a qualifying phrase is set off by itself with a comma, the comma indicates that the legislature intended that the qualifying phrase not be tied to the immediately preceding phrase, but instead should also qualify the other antecedents—here, clause (1)—as well. See 2A N. Singer, *Sutherland Statutory Construction* § 47.33, at 270 & n.5 (5th ed. 1992) ("Evidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one may be found in the fact that it is separated from the antecedents by a comma."). Moreover, Justice Douglas' construction would create the absurd result that the United States may be joined as a defendant in a general adjudication suit—like this suit—even if it does *not* "appear[] that the United States is the owner of or is in the process of acquiring water rights" and even if the United States is *not* "a necessary party to such suit." 43 U.S.C. 666(a). See 2A N. Singer, *Sutherland Statutory Construction* § 47.33, at 270 ("Where the sense of the entire act requires that a qualifying word or phrase apply to several preceding or even succeeding sections, the word or phrase will not be restricted to its immediate antecedent."); see also *McDonald* v. *United States*, 279 U.S. 12, 20-22 (1929).

however, are the same as those used by this Court. As the Court has explained:

> Statutory construction * * * is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear.

United Sav. Ass'n v. *Timbers of Inwood Forest Associates*, 484 U.S. 365, 371 (1988). Accord *Ohio*, 112 S. Ct. at 1641 ("It is axiomatic that a statute should be read as a whole."). In this instance, it is sensible to consider the McCarran Amendment's prior reference to "State law" in determining what Congress meant when it later used the term "the State laws." By contrast, the Idaho court's determination that the term refers to "all laws concerning an 'adjudication'" (Pet. App. 12a) finds no support in the Amendment. Indeed, the court's only justification for its construction is the court's recurrent (and circular) concern that if a different interpretation applied, the United States "would then be able to plead immunity and effectively control the adjudication." *Ibid.*

Our interpretation also makes the most sense when viewed in its broader context. The McCarran Amendment's joinder provision grants Congress's consent "to join the United States as a defendant" in a general stream adjudication suit. 43 U.S.C. 666(a). Nothing in that provision alone prevents the United States from asserting that it is immune from various state law obligations—such as beneficial use requirements—that a State may impose on citizens who acquire water rights through state doctrines of prior appropriation. It is the McCarran Amendment's pleading provision, which

precludes the United States from pleading that "the State laws are inapplicable," 43 U.S.C. 666(a), that prevents the United States from asserting a "sovereignty" defense to allegations of non-compliance with those requirements. The pleading provision spells out the scope of the congressional waiver of immunity insofar as the merits of the suit are concerned, making clear that the United States cannot rely on its sovereign status to excuse its failure to follow state law requirements in *acquiring water rights*, where the water rights are derived from state (as opposed to federal) law. But the pleading provision (like the joinder provision) does not waive the United States' immunity from other state laws, such as the filing fee assessments that Idaho seeks to impose in this case.[10]

The Idaho court sought support for its contrary result by drawing an analogy to this Court's decision

[10] This construction also explains why the McCarran Amendment allows adjudication of the United States' federal reserved water rights, but does not waive the United States' immunity from state laws that purport to restrict those rights. The McCarran Amendment's joinder provision applies whether the United States acquires water rights "by appropriation under State law" or "*otherwise*," 43 U.S.C. 666(a) (emphasis added), and therefore allows joinder of the United States to adjudicate both state appropriative rights and federal reserved rights. *County of Eagle*, 401 U.S. at 524. The McCarran Amendment's pleading provision, however, limits the United States' sovereignty defenses only with respect to "the State laws" governing acquisition of "water rights by appropriation." 43 U.S.C. 666(a). Thus, the McCarran Amendment preserves the rule that "determination of reserved water rights is not governed by state law." *Cappaert* v. *United States*, 426 U.S. 128, 145-146 (1976). See also *Winters* v. *United States*, 207 U.S. 564 (1908); *United States* v. *Adair*, 723 F.2d 1394, 1414 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984).

in *Nordic Village*, which concerned a congressional waiver of sovereign immunity in the Bankruptcy Code. See 11 U.S.C. 106. The court stated that "[t]he language of 43 U.S.C. § 666(a), just as plainly as the Bankruptcy Code did in 106(a) and (b), express [*sic*] a 'clear intent' of congress to subject the United States to all of the state court processes of an 'adjudication' of its water rights with the sole exception of costs." Pet. App. 12a. The Idaho court simply misread the *Nordic Village* decision, which powerfully supports our position.

In *Nordic Village*, this Court determined that a particular congressional waiver of federal sovereign immunity in the Bankruptcy Code, 11 U.S.C. 106(c), "fails to establish unambiguously that the waiver extends to monetary claims," because "[i]t is susceptible of at least two interpretations that do *not* authorize monetary relief." 112 S. Ct. at 1015. The Court contrasted the ambiguity of that provision with the "models of clarity" in two related provisions, 11 U.S.C. 106(a) and (b). The Court noted that those provisions specifically used the term "claim," which is defined within the Bankruptcy Code as a "right to payment" (11 U.S.C. 101(4)(A)). 112 S. Ct. at 1015. The McCarran Amendment clearly differs from Section 106(a) and (b) of the Bankruptcy Code, because it does not use terminology that necessarily expresses a waiver of immunity from monetary liability. Rather, like Section 106(c), the McCarran Amendment "fails to establish unambiguously that the waiver extends to monetary claims." 112 S. Ct. 1015. Indeed, the United States' claim of immunity is even more compelling here than in *Nordic Village*, because the United States has traditionally enjoyed a distinct im-

munity from fees and costs, for which a "separate waiver" is required. See *Library of Congress* v. *Shaw*, 478 U.S. at 314.[11]

In short, the Idaho Supreme Court failed to identify within the statutory text of the McCarran Amendment a "clear and unequivocal" waiver of immunity from filing fee assessments. See, *e.g.*, *United States Dep't of Energy* v. *Ohio*, 112 S. Ct. at 1635; *Hancock* v. *Train*, 426 U.S. at 182, 198. And the court made no attempt to construe the McCarran Amendment "strictly in favor of the [federal] sovereign." *Nordic Village*, 112 S. Ct. at 1015. Instead, it impermissibly enlarged the McCarran Amendment's waiver "beyond what the language requires." *Library of Congress*, 478 U.S. at 318. See Pet. App. 38a (Boyle, J., dissenting).[12]

[11] In *Library of Congress*, the Court held that Congress had not expressly waived the United States' immunity from payment of interest on attorney's fees in suits under the Civil Rights Act of 1964, even though Section 706(k) of that Act provided that the United States was "liable for costs the same as a private person," including "a reasonable attorney's fee as part of the costs." 42 U.S.C. 2000e-5(k). The Court rejected the contention that Congress waived the government's immunity from interest "by equating the United States' liability to that of a private party," explaining that neither the statute nor its history refers to interest and that "[t]his congressional silence does not permit us to read the provision as the requisite waiver of the Government's immunity with respect to interest." 478 U.S. at 319. The Court further explained that "statutes placing the United States in the same position as a private party * * * have been read narrowly to preserve certain immunities that the United States has enjoyed historically." *Id.* at 319-320.

[12] The Idaho Supreme Court also justified its ruling on its understanding that, prior to enactment of the McCarran

3. Not only do the McCarran Amendment's joinder and pleading provisions express no congressional consent to imposition of filing fees against the United States, but also the Amendment's judgment provision —specifically its costs proviso—indicates quite plainly that no such consent was intended. The judg-

Amendment, "at least six [States] did charge a fee for filing a notice of claim." Pet. App. 13a. Even if that statement were correct, it would not establish that the McCarran Amendment waived the United States' immunity from filing fees, because the Amendment contains no clear and unambiguous waiver of federal sovereign immunity from filing fees. In any event, no State assessed comparable fees in judicial suits for the general adjudication of water rights—the only type of proceeding to which the McCarran Amendment applies. See 43 U.S.C. 666(a). Nevada, Oregon, and Arizona required payment of filing fees in water right adjudications initiated by administrative proceedings, but they did not require payment of filing fees in general adjudication suits. See Ariz. Code §§ 75-114, 75-137 (1939) (Idaho Exh. 243); Nev. Comp. Laws §§ 7905, 7914, 7930 (Bender-Moss 1929) (Idaho Exhs. 252-256); Or. Comp. Laws Ann. §§ 116-801, 116-807, 116-822 (1940) (Idaho Exhs. 261-262). The difference is important because the McCarran Amendment waiver extends only to judicial water right proceedings. See 43 U.S.C. 666(a) (allowing joinder of the United States "as a defendant in any suit" for the general adjudication of water rights). In the case of California, Colorado, and Washington, each of those States charged a nominal flat fee for filing a notice of claim. See 1943 Cal. Stat. 1641 (Cal. Water Code § 2850) ($5 per claim) (Idaho Exh. 245); Colo. Rev. Stat. § 147-9-19(4) (1953) ($5 per claim) (Idaho Exh. 246); Wash. Rev. Stat. § 7371 (Remington 1932) ($1 per claim) (Idaho Exh. 266). They did not charge anything like the extraordinary variable fees that Idaho seeks to assess in this case. Of course, in the absence of an express waiver, even nominal filing fees cannot be assessed against the United States, in either judicial *or* administrative proceedings.

ment provision states that the United States shall be subject to the "judgments, orders, and decrees of the court having jurisdiction" to the same extent as a private party, except that "no judgment for costs shall be entered against the United States in any such suit." 43 U.S.C. 666(a). That provision makes clear that the United States retains its immunity from paying the State's (or any other party's) expenses in a suit for the general adjudication of water rights.

The Idaho Supreme Court concluded that the costs proviso does not affect Idaho's power to assess filing fees against the United States, because fees "are distinguishable from costs." Pet. App. 14a. The court's attempt to distinguish "fees" from "costs" misses the point. To assess filing fees against the United States, the State must demonstrate from the text of the McCarran Amendment that Congress "unequivocally" consented to those assessments. See pp. 15-17, *supra*. Congressional silence will not suffice. *Library of Congress*, 478 U.S. at 319. As we have explained, the McCarran Amendment contains no express waiver. The costs proviso shows that the Amendment is not merely silent on the question. Compare *Ohio*, *supra*; *Nordic Village*, *supra*. Instead, Congress took affirmative steps to protect the United States from state cost-shifting mechanisms. The costs proviso thus provides *additional* textual evidence—beyond the absence of an express waiver—that the United States retains its immunity from Idaho's filing fees.

In any event, Idaho's attempt to distinguish "fees" from "costs" is unpersuasive. The court reasoned that "[w]hile costs are the charges that a party may recover from the opponent, fees are those amounts

paid to the court." Pet. App. 14a. That distinction, however, exalts form over substance. A judgment for "costs" and Idaho's fee assessments are functionally equivalent: they both would require the United States to reimburse the State's litigation expenses. Indeed, the Idaho Code makes clear that the filing fees are assessed for the specific purpose of "financing the *costs* of adjudicating water rights." Idaho Code § 42-1414 (1990) (emphasis added).

Like a judgment for costs, Idaho's filing fee assessments are simply a mechanism for the State to recoup designated portions of its adjudication expenditures.[13] The fee assessments differ from a judgment for costs only in the *manner* by which the State exacts money from the federal treasury. That purely procedural difference does not overcome the clear import of the McCarran Amendment's costs proviso.

---

[13] For example, the federal judicial code includes among the "costs" that may be taxed against a party:

> (1) Fees of the clerk and marshal;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title;
>
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

28 U.S.C. 1920. See also, *e.g.*, 42 U.S.C. 1988 ("the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs").

Congress adopted that proviso to protect the United States from monetary liability—not to preclude only a particular time or method of assessment.

The Idaho Supreme Court also suggested that Idaho's filing fees are not "actually 'costs' incurred by a party litigant," because the Director of the Department of Water Resources "is really a disinterested party" whose role in the adjudication "is analogous to the 'stakeholder' in an interpleader action." Pet. App. 15a. That supposed distinction is of no moment. Nothing in the costs proviso or the concept of "costs" warrants different treatment for "interested" and "disinterested" parties.[14] In any event,

[14] For example, if the Idaho court had appointed a "disinterested" special master (see note 15, *infra*), his compensation and expenses might be taxed against a private party as "costs." See *Newton* v. *Consolidated Gas Co.*, 259 U.S. 101, 103, 106 (1922) (compensation of special master taxed as costs); *Ex parte Peterson*, 253 U.S. 300, 314-317 (1920) (auditor's fees taxed as costs). See also Fed. R. Civ. P. 53(a). Under the McCarran Amendment's costs proviso, however, those costs could not be taxed against the United States. Indeed, even outside of the McCarran Amendment, the United States has not waived its immunity from special master fees. See 28 U.S.C. 2412(a) (waiving the United States' immunity only to those costs enumerated in 28 U.S.C. 1920, which do not include special master fees). Exercising his authority to "supervise litigation," 28 U.S.C. 519, the Attorney General may agree to the appointment and compensation of a special master, but he is under no duty to do so and may refuse to pay the costs of a master appointed over his objection. If a federal court appoints a master over the government's objection, the master's expenses would then be paid through the judiciary's appropriations. See 52 Comp. Gen. 621, 623 (1973) (independent experts appointed by the court to assist the court's deliberations may be paid through the appropriations for the judiciary); accord 48 Comp. Gen. 681, 684 (1969); 39 Comp. Gen. 133, 137 (1959).

the Director is acting not as a distinterested "stakeholder" or factfinder for the court, but rather as a litigant who has sued the United States (as permitted by the McCarran Amendment) and who has interests adverse to those of the United States and the Indian Tribes that the federal government represents. See Amici Br. for the Nez Perce Tribe *et al.*

The Idaho Code manifestly assigns the Director an adversarial role in the litigation. It expressly defines the Director as a *party* to the suit. Idaho Code § 42-1401A(7) (1990). The Code then instructs the Director to receive the United States' claims and file a report describing them, Idaho Code §§ 42-1409 to 42-1411 (1990), but it expressly denominates those claims, the Director's report, any objections, and the Director's responses thereto as "pleadings." Idaho Code § 42-1412(4) (1990). Thus, the recommendations to be contained in the Director's report will be titled "proposed findings of fact." Tr. 611. Indeed, the Director initiated this adjudication, joining the United States as a "defendant," as required by the McCarran Amendment for joinder of the United States in the suit. Pet. App. 5a; see Idaho Code §§ 42-1406, 42-1406A (1990). And if the Director disagrees with the United States' water right claims, he may contest them, and if unsuccessful, he may appeal the district court's judgment. Idaho Code §§ 42-1412, 42-1418 (1990).[15]

[15] The Idaho Code separately provides for appointment of a special master to assist the court "to determine the water right claims asserted in the general adjudication." Idaho Code § 42-1422 (1990). The Idaho Supreme Court has specifically ruled that the Director cannot act as a special master in light of his participation as a party in the litigation. See

The Idaho Supreme Court's suggestion (Pet. App. 14a-15a, 15a-16a) that the United States benefits from the Director's activities ignores the realities of this litigation. The United States did not make its appearance in this suit as " 'a water applicant' or claimant seeking affirmative relief from the state." *Id.* at 16a. It has not voluntarily "entered the suit asking that its rights be determined." *Ibid.* The United States is an involuntary defendant that must participate in the adjudication to avoid losing its water rights. The true beneficiaries of this suit are the State of Idaho and the Idaho Power Company, who arranged for this litigation in the course of settling their prior lawsuit. As Justice Johnson aptly stated, "[t]he long and short of it is that the Idaho Power Company and the State of Idaho set the SRBA [Snake River Basin Adjudication] in motion. The United States is just along for the ride, pursuant to the McCarran Amendment." Pet. App. 28a (Johnson, J., dissenting).

Contrary to the Idaho Supreme Court's suggestion, the Director provides no special "services" to the United States. The Director's statutory responsibilities—such as serving process and collecting claims (see pp. 6-7, *supra*)—are simply obligations that the Director ought to assume as the initiator of this lawsuit. For example, a party's expenses in service of process are a classic example of litigation "costs." See, *e.g.*, 28 U.S.C. 1920, 1921 (fees for service by United States marshals may be taxed as

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Avondale Irrig. Dist. v. *North Idaho Properties, Inc.*, 523 P.2d 818, 822 (1974). Cf. *United States* v. *Superior Court*, 697 P.2d 658, 671-674 (Ariz. 1985) (state water resource agency does not act as "an adjudicator of fact or law" in a general water right adjudication).

costs). Other services the Director purports to provide to Idaho citizens—such as assistance in drafting claims, see Tr. 1178-1179—are not specifically included among the Director's statutory responsibilities, *ibid.*, and are neither requested by nor of any benefit to the United States. Indeed, some of the "services" that the Director purports to provide, such as access to the State's computer database, are available only at *additional* cost to a claimant. Tr. 1184-1185.

Moreover, the Director will actually employ the filing fees paid by the United States to fund, among other things, challenges to the United States' water right claims. Idaho uses filing fees to pay attorney salaries and other adjudication costs, including the Director's expenses incurred in investigation of matters to be included in his report, preparation and defense of the report, conduct of discovery, preparation of legal exhibits, drafting of other pleadings, preparation of expert witnesses for trial, appearance of witnesses at trial, and numerous other litigation-related activities. See, *e.g.*, U.S. Exh. 3006, at 2-10, 51-55; R. 423-424; Tr. 376, 378-381, 384-385, 390-391, 396-398, 547-553, 595. The State has projected that it will charge $2.1 million in attorney salaries to the adjudication account. See Tr. 417, 545-546.[16]

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[16] Idaho's method of financing the State's costs of adjudicating water rights through fixed and variable filing fees at the outset of the adjudication actually allows the State to recover even more costs than were previously recoverable by way of a judgment for costs. Under the prior system, Idaho could utilize a judgment for costs to recover from private litigants the costs of filing, processing, investigating, and reporting on water right claims. See Idaho Code § 42-1401 (1948) (Idaho Exh. 247) (authorizing the court to "adjudge and determine the proportionate amount of such cost of examination and

As this Court has stated, sovereign immunity may not be avoided "by devising a new name for an old institution." *Library of Congress*, 478 U.S. at 321. That principle applies here. The McCarran Amendment's costs proviso prohibits a State from obtaining a judgment for costs against the United States, and Idaho's latest method for recovering its litigation expenses—assessment of filing fees—does not differ in any material respect from a judgment for costs. Idaho's filing fees accomplish the same cost-shifting function that the State previously accomplished through a judgment for costs. The filing fee mechanism simply moves the timing of that cost-shifting forward to the start of the litigation and enlarges the class of recoverable expenses. Thus, not only does the McCarran Amendment lack any express consent to Idaho's assessment of filing fees, but by the clear import of the costs proviso, the United States' immunity is affirmatively expressed.

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survey to be paid by each of the parties"). Idaho's filing fees allow the State to recoup an additional category of litigation expenses—including attorney salaries, costs of service of process, witness expenses, evidentiary development expenses, investigatory expenses, and certain judicial expenses—that were not recoverable through a judgment for costs.

CONCLUSION

The judgment of the Idaho Supreme Court should be reversed.

Respectfully submitted.

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UNITED STATES OF AMERICA,

Petitioner,

v.

STATE OF IDAHO, EX REL. DIRECTOR,
IDAHO DEPARTMENT OF WATER RESOURCES,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Idaho

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QUESTION PRESENTED

The question presented is whether the McCarran Amendment, 43 U.S.C. § 666(a), waives the United States' right to plead immunity from Idaho's general stream adjudication procedures, including payment of filing fees for special services rendered by the Idaho Department of Water Resources and judiciary to all claimants.

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2 WELLS A. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES (U.S. Dept. of Agriculture Misc. Pub. No. 1206, 1974) 3

A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES, ch. 7 (1992) 4

9 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2410 (1971) 32

10 WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE § 2666 (1983) 41, 44

10 WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE § 2667 (1983) 44

Brief in Support of Motion for Comparison Reports and Reverification, *In the Matter of the Adjudication of the Existing Rights to the Use of All the Water, Both Surface and Underground, Within all Water Basins in the State of Montana*, (No. WC-88-1) 32, 33

OPINIONS BELOW

Petitioner's Appendix (Pet. App.) fully sets forth the opinions below.

STATUTES INVOLVED

The principal statutory provisions, 43 U.S.C. § 666 and Idaho Code § 42-1414, are fully set forth in the Brief for the United States. The Idaho water rights adjudication statute, ch. 14, title 42, Idaho Code, is set forth in the appendix to Idaho's Brief in Opposition to Petition for Certiorari.

STATEMENT OF THE CASE

The Snake River is one of the great rivers of the western United States. It rises along the continental divide near Yellowstone and Grand Teton National Parks in Wyoming, and travels across southern Idaho in a broad crescent. Along the way it joins with such rivers as the Henry's Fork, internationally known for its fly fishing, the Blackfoot River, the Big Wood River, the Bruneau River, the Boise River and the Payette River. At the western boundary of Idaho, the Snake enters Oregon for a short time and turns north. The river then becomes the boundary between Idaho and the states of Oregon and Washington while passing through the nation's deepest gorge, Hells Canyon. Along the way the Salmon River, the fabled "River of No Return" of the Lewis and Clark expedition, drains into the Snake out of the huge wilderness of central Idaho. Further north, the Clearwater River leaves the continental divide at the top of the Bitterroot

Mountains and joins the Snake River near Lewiston, where the Snake leaves Idaho. In all, the Snake River Basin includes eighty-seven percent of the State of Idaho. Tr. 947.

The Snake River and its tributaries[1] provide the only water for most of Idaho. The water is used for irrigation, not only on farms in the Snake River Plain in southern Idaho, but also for all the farms in valleys tucked throughout the Basin. The water provides flows for white water rafting and trout fishing for visitors from around the world. Cities, factories and fish farms all obtain their water from the Snake River and its tributaries. Every need for water on approximately 72,694 square miles of land must be satisfied with water that is part of the Snake River Basin.[2] Over 64% of this area is owned by the United States. Tr. 948.

The Snake River Basin Adjudication [SRBA], from which this case arises, was initiated in 1987. Contrary to the United States' assertion that the Swan Falls settlement was the genesis of the SRBA, the recommendation to initiate the SRBA came from a committee appointed by the governor of the State of Idaho, called the Snake River Technical Advisory Committee. Tr. 863-65. The Committee included representatives of the United States Department of Interior Bureau of Reclamation and the United States Geological Survey. Tr. 1119-1122; 1127-1128. All parties to the committee agreed that an adjudication was

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[1] The Snake River's tributaries include the ground water aquifers in the Snake River Basin.

[2] The total area of the State of Idaho is 83,557 square miles. Idaho Exh. No. 232 at 5. Eighty-seven percent of this total is 72,694 square miles.

necessary in order to effectively manage the water of the Snake River Basin. Tr. at 1127. After the 1983 Technical Advisory Committee Report was issued, the State of Idaho and Idaho Power Company began negotiations that led to the Swan Falls settlement, which resolved a dispute over the company's water rights. The settlement agreement accepted the technical advisory committee's recommendation to commence a general adjudication of the Snake River Basin. Tr. 902-04.

The size and complexity of water rights adjudications set them apart from other types of proceedings. This is especially true for the SRBA. Over 90,000 non-federal claims have been filed in the SRBA and federal claims will exceed 30,000. Tr. 952; R. 248, 253-55, 261, 272, 279, 285, 505. The difficulty of adjudicating over 120,000 water rights spread over 72,000 square miles of diverse terrain cannot be overstated. Each of these 120,000 claims has the potential for being an individual suit determining whether the claim is valid. In order to address this daunting task, Idaho developed an adjudication procedure that is a combination of administrative and judicial procedures, very similar to the systems in other western states.[3] The process adopted by Idaho centralizes planning

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[3] In the western states four different general water rights adjudication systems have been adopted, the Colorado, Wyoming, Oregon and Bien Code systems. 2 WELLS A. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 452-59 (U.S. Dep't of Agriculture, Misc. Pub. No. 1206, 1974). All of these systems contemplate a large administrative component except for the Colorado system. *Id. See, generally,* C. Peter Goplerud III, *Adjudication of Water Rights,* in 2 WATERS AND WATER RIGHTS, ch. 15 (Robert E. Beck ed., 1991); Edward W. Clyde, *General Adjudication Proceedings,* in 6 WATERS AND WATERS RIGHTS, ch. 29 (Robert

and fact-finding in an administrative agency, with ongoing court oversight.

The responsibility for the administrative portions of the SRBA is vested in the Director of the Idaho Department of Water Resources [IDWR]. The IDWR was required by statute to petition the district court to commence the SRBA. Idaho Code §§ 42-1406A; 42-1408 (1990).

Upon the district court's determination of the scope of the adjudication, the IDWR served notice of the commencement upon the 450,000 owners of real property within the boundaries of the adjudication. Tr. 952. This required a search of, among other records, county tax records and state water rights records. Idaho Code § 42-1408A (Supp. 1992); Tr. 952-53. Special studies to review service were performed to ensure that all claimants received proper notice. Tr. 957-959. The notice was also published in newspapers around the state, and posted in all the county courthouses, recorders' offices, and assessors' offices within the Snake River Basin in Idaho. Idaho Code § 42-1408A(2) (1990). The special procedures regarding service ensure that the final decree in the SRBA will be binding on all persons. Idaho Code § 42-1420 (1990).

As part of the service of notice, the IDWR supplied a notice of claim form prepared by the IDWR to each claimant. Idaho Code § 42-1409 (1990). The IDWR also made maps and other information available to claimants to assist in preparing their notices of claim. Idaho Code § 42-1410(4) (1990).

Clark ed., 1972); A. Dan Tarlock, Law of Water Rights and Resources, ch. 7 (1992).

Each of the over 120,000 claims will be reviewed to verify that it provides the necessary information. When requested, the IDWR provides assistance to claimants to ensure that their notice of claim contains all the necessary information. Tr. 953. Each claim is then processed by adding new information from the claim into the IDWR's existing computer database. Tr. 656.

After reviewing and processing the claims, the IDWR is directed to examine the water system and uses of water, "for such a period of time as is necessary to evaluate the extent and nature of each water right for which a notice of claim has been filed." Idaho Code § 42-1410 (1990). This is no simple matter. The IDWR compares the notices of claim with existing water right records such as prior adjudication decrees, licenses, permits, and approved applications for changes in use. U.S. Exh. 3006, at 4. Many water rights in Idaho were obtained and continue to be defined simply by the "use" that is being made of the water. *Nielson v. Parker*, 19 Idaho 727, 733, 115 P. 488, 490 (1911) (surface water rights); *Silkey v. Tiegs*, 51 Idaho 344, 353, 5 P.2d 1049, 1053 (1931) (ground water rights).[4] The only way to determine the nature of these claimed water rights is by examining actual water use, investigating its history, and determining how that water use interrelates to the water uses of others. Such investigations may also be necessary when discrepancies

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[4] Idaho's permit system for ground water rights was not mandatory until 1963, and was not mandatory for surface water rights until 1971. Idaho Code §§ 42-103 and 42-229 (1990).

are found between claims and existing water rights records. Investigations can include fact-finding hearings as well as field examinations. Idaho Code § 42-1410(1) (1990).

After completing its investigations, the IDWR prepares a report on the water system, including a "determination of the rights to the use of water from the water system . . . . " Idaho Code § 42-1411(1) (1990). This report is commonly referred to as the "director's report." For each water right acquired under state law, the IDWR investigates and presents recommendations regarding nine separate elements, including the priority date of the water right and the time, place, purpose, and amount of water use. Idaho Code § 42-1411(2) (1990). The Director's recommendations also include provisions regarding how water rights are to be delivered among themselves and how various water bodies such as ground water aquifers and surface tributaries are to be administered in relation to each other. Tr. 643-44, 996-98. The IDWR files a copy of the director's report with each affected county, and serves a notice of filing on each claimant, which includes the proposed recommendation of the claim. Idaho Code § 42-1411(4) (1990).

Under Idaho's adjudication laws, claimants are never required to file and serve a traditional complaint alleging their water rights or file and serve an answer to the thousands of other claims. Likewise, the notices of claim do not have to be served on all of the other water right claimants in the SRBA or filed with the district court as would be the case in typical litigation. See Idaho Code § 42-1409(6) (1990).

Rather, claims are filed solely with the IDWR, and after they are reviewed, the director files a director's

report containing a recommendation for each water right claimed under state law and an abstract of federal reserved water right claims. Parties file objections to the IDWR's recommendations as compiled in the director's report.[5] Idaho Code § 42-1412(1) (1990). The IDWR files with the district court a response to any objection made to the director's report. The IDWR attaches to that response the claimant's original claim. Idaho Code § 42-1412(2) (1990). After the period for filing objections and responses expires, hearings are held by the district court only on those water rights for which objections are filed. Idaho Code § 42-1412(7) (1990). The portions of the director's report for which no objections are filed are admitted as true facts and proceed directly to decree without the necessity of an adversarial proceeding. Idaho Code § 42-1412(9) (1990).

The massive size of the SRBA, dictated that many processes be centralized in the IDWR in order to make the adjudication manageable. The IDWR estimated at the time of the trial in this matter that it would cost $32 million to provide the adjudication services required by statute. R. 190.

A committee appointed by the governor determined that the services provided by the IDWR were of benefit primarily to the claimants in the adjudication.

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[5] Claims for federal reserved water rights may be objected to by other parties. Idaho Code § 42-1412(1) (1990). Since such rights are abstracted by the IDWR, however, the IDWR does not respond to such objections. Instead, the United States responds on its own behalf. Idaho Code § 42-1412(3) (1990).

R. 553. Thus, it was recommended that the adjudication services provided by the IDWR be financed through a filing fee that would accompany each notice of claim. R. 554. The Idaho legislature ultimately adopted such a system. Idaho Code § 42-1414 (1990). The fees go into the adjudication account, which may be used only to "pay the costs of the [IDWR] attributable to general water rights adjudications," and "judicial expenses directly related to the Snake river adjudication. . . . " Idaho Code § 42-1777 (1990).

The United States estimates its filing fees will be $10 million. Brief for the United States at 9. These fees will cover adjudication services relating to over 30,000 claims made by at least twelve different federal agencies. All told, this averages approximately $330 per claim. The fees will help secure the only water available for the 23 million acres of federal land within the boundaries of the SRBA.

Nonetheless, the United States complains in its "Statement" that the fee structure falls more heavily on governmental claimants, because governmental claimants must pay $100 per cfs[6] for instream flow claims,[7] while agricultural users pay one dollar per acre irrigated and hydropower users pay $3.50 per kilowatt of capacity. Brief for the United States at 9. The United States' suggestion that the fees "fall more heavily" on governmental claimants misstates the fee schedule. The fee of $100 per cfs applies not only to sovereign instream flow claimants,

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[6] "Cubic feet per second" is a standard measure of water flow. Idaho Code § 42-102 (1990).

[7] In Idaho, the only claimants of instream flows are the State of Idaho, the United States, and Indian tribes.

but also to private claimants using water for municipal, industrial, commercial, mining, heating, or cooling purposes. Idaho Code § 42-1414(2) (1990).

Moreover, comparing a fee based upon cubic feet per second flow of water to a fee based upon the number of irrigated acres compares apples to oranges. Instream flow rights generally are established year around, while agriculture has a shorter irrigation season. Instream flows are established along stream "reaches" which extend for miles while irrigation water use has a discrete point of diversion and place of use.

Additionally, the United States estimates that it will assert claims for over 814,000 irrigated acres and for hydropower facilities totaling 641,650 kilowatts of capacity. R. 253, 255, 258, 261, 266, 272, 275, 279, 282, 285. Thus, even if one assumes the United States is correct when it asserts fees for agriculture and hydropower are "lower," it too will benefit from such "lower" fees. Furthermore, most of the United States' claims are for domestic and stockwatering uses, which have a fixed fee of only twenty-five dollars per claim. R. 248-292.

It should also be noted that the amount of fees the United States will pay could well be overstated. The United States has not yet submitted its actual claims in the SRBA. Thus, the total number and size of claims filed by the United States could be substantially smaller than described in the affidavits cited by the United States. *See* R. 248-292. Additionally, the Idaho legislature has encouraged negotiation of federal reserved water right claims.

See, e.g., House Concurrent Resolution No. 16, 1985 Idaho Sess. Laws 745. Such negotiations have, in at least one instance, resulted in an agreement whereby the state paid the filing fees of the United States for the federal reserved water rights of the Shoshone-Bannock Indian Tribes. 1991 Idaho Sess. Laws Chap. 228, p. 547; Pub. L. 101-602, 104 Stat. 3059 (1990).

The United States also alleges that it receives no benefit from the adjudication. Brief for United States at 12-13, 35-37. As discussed more fully in Sections I.B. 1 & 2, *infra* at 29-40, there is a significant benefit to all water users in knowing the scope of their water rights. Further, the services provided by the state ensure that this benefit is obtained by streamlining the adjudication. The unbiased information and technical analysis provided by the state allow claimants to more effectively assert and protect their water right claims and review all other claims.

SUMMARY OF ARGUMENT

I.

This Court's decisions have concluded uniformly that the plain language of the McCarran Amendment, as well as the policies underlying the Amendment, require the United States, once joined in a general stream adjudication, to comply with the comprehensive procedures established by each state for the adjudication of water right claims.

> [W]e have recognized that actions seeking the allocation of water essentially involve the

> [W]e have recognized that actions seeking the allocation of water essentially involve the disposition of property and are best conducted in unified proceedings. The consent to jurisdiction given by the McCarran Amendment bespeaks a policy that recognizes the *availability of comprehensive state systems for adjudication of water rights* as the means for achieving these goals.

Colorado River Water Conservation District v. United States, 424 U.S. 800, 819 (citations omitted) (emphasis added). The waiver of immunity applies even if a state adopts new and more burdensome procedures. *United States v. District Court for Water Div. No. 5*, 401 U.S. 527, 529 (1971).

In addition to conflicting with this Court's prior decisions, the United States' attempt to construe the McCarran Amendment to only waive federal sovereign immunity to state appropriation laws is not supported by the plain language of the statute. The first provision of the McCarran Amendment gives consent to join the United States in a general stream adjudication. The second provision provides that the United States is required to comply with "the State laws." The only plausible reading of this provision is to require the United States to comply with those state laws governing the conduct of suits for the adjudication and administration of water rights. The legislative history of the McCarran Amendment confirms this reading. Congress sought to preserve and protect the ability of the states to maintain the unique procedures each state had developed for the adjudication and administration of water rights. S. Rep. No. 755, 82d Cong., 1st Sess., 4-5 (1951).

Since the adjudication filing fee is a part of the comprehensive state procedures established by Idaho for the adjudication of water rights, it falls within the plain

language of the waiver of immunity found in the McCarran Amendment. The fee finances services that allow the State to centralize critical adjudication procedures, thereby facilitating the conduct of general stream adjudications. Without such centralization, the adjudication of the 120,000 water rights at issue in the SRBA would be unmanageable. Rather than having the full benefit of an independent and impartial expert, the trial court would be left to sort through the engineering testimony and exhibits of a multitude of parties. Correspondingly, claimants would incur the cost of duplicating services currently provided by the IDWR at much less expense.

II.

The only exception to the sweeping waiver of sovereign immunity in the McCarran Amendment is "That no judgment for costs shall be entered against the United States in any such suit." 43 U.S.C. § 666(a). The Court has recognized that the "proper objective" when construing exceptions to a broad waiver of immunity "is to identify 'those circumstances which are within the words and reason of the exception' – no less and no more." *Kosak v. United States*, 465 U.S. 848, 853 n.9 (1984); *United States v. Nordic Village, Inc.*, 112 U.S. 1011, 1014 (1992).

A "judgment for costs" serves to reimburse prevailing litigants for the expenses incurred in asserting their rights. The filing fees at issue in this case are required by law to be used to finance centralized, quasi-judicial services that facilitate the conduct of the adjudication and are for the benefit of the claimants as a whole. The Director is neither a claimant nor a prevailing party, but rather an independent fact finder. Further, the fees are assessed equally upon all parties by statute, not imposed

by the court on the losing party. Thus, the fees fall outside the plain meaning of the "judgment for costs" exception.

ARGUMENT

I. THE MCCARRAN AMENDMENT WAIVES THE UNITED STATES' RIGHT TO PLEAD IMMUNITY FROM STATE ADJUDICATION PROCEDURES, SUCH AS IDAHO'S FILING FEES.

The McCarran Amendment waives the United States' sovereign immunity from participating in state water rights adjudications with simple, sweeping language:

> Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: Provided, That no judgment for costs shall be entered against the United States in any such suit.

43 U.S.C. § 666(a). A thoughtful examination of this statutory provision and the Court's previous decisions construing it reveal that Idaho's filing fee is a common element of state water rights adjudication laws and falls squarely within the McCarran Amendment waiver of sovereign immunity.

A. The Supreme Court Has Interpreted The McCarran Amendment As A Sweeping Waiver Of The United States' Right To Plead Immunity From State Water Rights Adjudication Laws.

The United States concedes, as it must, that the McCarran Amendment waives its immunity; however, the United States argues the waiver is limited to "substantive state laws governing the acqui[sition of] water rights by appropriation," not state laws governing adjudications. Brief for United States at 24-25. It asserts this interpretation is required by the rule of strict construction of waivers of sovereign immunity. The United States' argument to limit the scope of the waiver ignores, however, this Court's decisions construing the McCarran Amendment as a sweeping waiver of the United States' sovereign immunity to comprehensive state systems for adjudication of water rights.[8]

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[8] A central canon of judicial decision-making is that the courts will apply the law consistently and, under the doctrine of *stare decisis*, will stand on principles of law determined in their previous decisions. For instance, when considering the preemptive effect of the Federal Power Act of 1935, 43 U.S.C. § 383, the Court noted:

> Adherence to precedent is, in the usual case, a cardinal and guiding principle of adjudication, and "[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." *Patterson v. McLean Credit Union*, 491 U.S. ___, ___, 109 S. Ct. 2363, 2370, 105 L.Ed.2d 132 (1989).

California v. Federal Energy Regulatory Commission, 495 U.S. 490, 499 (1990).

Rather than relying on generalized canons of statutory construction, the Court's analysis of the McCarran Amendment has focused on the unique nature of the statute.

> [W]ater rights adjudication is a virtually unique type of proceeding, and the McCarran Amendment is a virtually unique federal statute, and we cannot in this context be guided by general propositions.

Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 571 (1983). In the context of the McCarran Amendment, as with other "sweeping" waivers of sovereign immunity, the Court has paid special attention to the Congressional policy underlying the language of the Amendment.

The principle that has guided the Court in its interpretation of the McCarran Amendment is that all water right claimants, including the United States, must be subject to state general stream adjudication laws. *See, e.g., Colorado River Water Conservation District v. United States*, 424 U.S. 800, 810-11, 819 (1976). The United States, however, has consistently attempted to limit its participation in state general water rights adjudications by arguing the Amendment is ambiguous and, as a result, strict rules of construction should be applied to narrow the scope of the waiver. This Court has uniformly rejected these attempts.

In *United States v. District Court for Eagle County*, 401 U.S. 520 (1971), the Court held that the McCarran Amendment permitted the adjudication of reserved

rights of the United States in state court. The Court relied on statements of Senator McCarran in the legislative history of the Amendment to reject the United States' "extremely technical" argument that the Colorado suit was a supplemental proceeding, and therefore was not a general adjudication. *Id.* at 525.[9]

In *United States v. District Court for Water Division No. 5*, 401 U.S. 527 (1971), the companion case to *District Court for Eagle County, supra*, the Court again rejected the narrow construction argument of the United States. The United States argued that the procedures under the new Colorado Water Right Determination and Administration Act of 1969 were "much more burdensome on the Government than they were under the older Act." *Id.* at 529. The new statute contemplated monthly proceedings before a water referee on water rights applications, and the only water rights considered in the proceeding were those for which an application had been filed within a particular month. *Id.* Nonetheless, the Court upheld application of these new, more burdensome, procedures to the United States because the Colorado suit was a "general adjudication" as required by the McCarran Amendment's consent-to-be-sued provision. *Id.; cf. Dugan*

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[9] The Court rejected the United States' alternative reading of the phrase "water rights by appropriation under State Law, by purchase, by exchange, or otherwise," as referring only to rights obtained pursuant to state law. 401 U.S. at 524. The Court construed the scope of the waiver broadly to include appropriative rights, riparian rights and reserved rights because the McCarran Amendment is an "all inclusive statute." *Id.* This construction of the McCarran Amendment demonstrates that the Court has not resorted to the methods of strict construction applied by the Court in the context of less sweeping waivers. *See Department of Energy v. Ohio*, 112 S.Ct. 1627 (1992).

v. Rank, 372 U.S. 609, 618 (1963) (private suit to determine water rights not a general stream adjudication).

In *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), the United States argued that state court jurisdiction over Indian reserved rights should not be recognized, unless expressly conferred by Congress. *Id.* at 812. The Court rejected this argument and held, based upon not only the Amendment's language but also its underlying policy and legislative history, that state courts have jurisdiction over Indian reserved rights under the Amendment. *Id.* at 809-814. The Court went on to uphold the dismissal of the concurrent federal district court action in favor of the state court proceedings. The Court stated that the "clear federal policy evinced by [the McCarran Amendment] is the avoidance of piecemeal adjudication of water rights in a river system." *Id.* at 819. The Court went on to state:

> [W]e have recognized that actions seeking the allocation of water essentially involve the disposition of property and are best conducted in unified proceedings. The consent to jurisdiction given by the McCarran Amendment bespeaks a policy that recognizes the *availability of comprehensive state systems for adjudication of water rights* as the means for achieving these goals.

Id. at 819 (citations omitted) (emphasis added).

In *San Carlos Apache Tribe*, the sequel to *Colorado River Water Conservation District*, the Court re-emphasized the importance to its previous decision of the states' adjudication procedures:

> In the case at hand [*Colorado River Water Conservation District*], we noted the comprehensive nature of the state proceedings and the considerable expertise and technical resources available in those proceedings.

Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 552 (1983).[10]

The United States' reliance on the rule of strict construction of waivers of sovereign immunity cannot be reconciled with the method of analysis the Court has used in the prior McCarran Amendment cases. A common thread in each of these cases is the consistent holding that the McCarran Amendment embodies the congressional policy of encouraging states to apply their expertise and adjudication procedures to the United States' water rights. Indeed, in *Water Division No. 5* this Court specifically rejected the United States' argument that the McCarran Amendment did not waive federal immunity to Colorado's state adjudication procedures. Likewise, as shown below, the McCarran Amendment waives the United States' immunity to Idaho's adjudication procedure, including payment of the statutory filing fee.

B. The Plain Language Of The McCarran Amendment And Its Legislative History Require That The United States Comply With State Laws Governing The Conduct Of General Stream Adjudications.

The structure of the McCarran Amendment is plain and uncomplicated. The first sentence provides the terms pursuant to which the United States consents to joinder. *See District Court for Eagle County*, 401 U.S. at 523-24. The second sentence, in plain language, waives the United States' sovereign immunity from the application of the

[10] In a later passage, the Court noted the "administrative machinery available to the state courts" as a reason to defer to state proceedings. 463 U.S. at 570.

state laws pursuant to which adjudications are conducted:

> The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty. . . .

43 U.S.C. § 666(a).[11] As discussed above, this Court has construed this plain language to require the United States, once joined in a general stream adjudication, to comply with state laws governing the conduct of the adjudication even when new and more burdensome procedures are adopted. *District Court for Water Division No. 5, supra.*

The Court has treated the broad language of the McCarran Amendment similarly to the "sue or be sued" clauses associated with federal governmental corporations. *See Franchise Tax Board of California v. United States Postal Service*, 467 U.S. 512 (1984) (and cases cited therein); *Ardestani v. Immigration and Naturalization Service*, 112 S.Ct. 515, 520 (1991) ("[W]e have recognized that once Congress has waived sovereign immunity over certain subject matter, the Court should be careful not to

[11] This is the only sentence in the McCarran Amendment which explicitly approves of application of *state* laws to the United States. Thus, it must be read together with the first sentence which does not explicitly mention suits in state courts. This point was made in Idaho's Brief in Opposition to Certiorari at 15. The United States selectively edits a quote from that Brief to improperly suggest that Idaho recognizes that the first sentence is a limited waiver of immunity to state court jurisdiction. This misquote is used to support the United States' tortured argument that the clear waiver in the second sentence relates to laws regarding acquisition of water rights, not adjudication of those rights. Brief for the United States at 19.

'assume the authority to narrow the waiver that Congress intended . . . . ' "). The broad construction of "sue and be sued" clauses results from the view that when Congress "authorizes [a governmental agency] to engage in commercial and business transactions with the public, and permits it to 'sue and be sued,' " those governmental agencies will be "treated similarly to other self-sustaining commercial ventures." *Franchise Tax Board of California*, 467 U.S. at 517, 525.

Similarly, when the federal government quantifies its water rights, whether based upon federal or state law, those rights are being integrated with a property regime of highly interdependent rights, where the nature of a water right cannot be known until all the others around it are defined.[12] The integrity of this system of interlocking rights depends upon a single adjudicative system defining the interrelationship between all rights:

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[12]Water rights created by the appropriation doctrine might be analogized to a jigsaw puzzle in which each piece represents a water right. The area of a piece represents the diversionary entitlement, and the shape presents other variables which affect stream flows. These variables include the amount and timing of return flows, the place at which they enter the stream, the frequency and the seasonal patterns of diversion, and the point of diversion. The first appropriator is free to carve out a piece of any size and shape. Each subsequent appropriator is also free to determine the size and shape of his piece, except that it cannot encroach on the pieces carved out by prior appropriators. As this process progresses, the pieces or rights become a tightly interlocking pastiche.

George A. Gould, *Water Rights Transfers and Third-Party Effects*, 23 LAND AND WATER L. REV. 1, 12 (1988).

> The clear federal policy evinced by [the McCarran Amendment] is the avoidance of piecemeal adjudication of water rights in a river system. This policy is akin to that underlying the rule requiring that jurisdiction be yielded to the court first acquiring control of property, for the concern in such instances is with avoiding the generation of additional litigation through permitting inconsistent dispositions of property. This concern is heightened with respect to water rights, the relationships among which are highly interdependent.

Colorado River Water Conservation District, 424 U.S. at 819. Thus, in general adjudications, where all water rights on a river system are to be defined, this Court has determined that the McCarran Amendment allows the United States to "sue or be sued" like any other water right holder. This is exactly what Congress had in mind with the McCarran Amendment:

> In the administration of and the adjudication of water rights under State laws the State courts are vested with the jurisdiction necessary for the proper and efficient disposition thereof, and by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights. Accordingly all water users on a stream, in practically every case, are interested and necessary parties to any court proceedings. It is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its departments is permitted to claim immunity from suit in, or orders of, a State court, such claims could materially interfere with the lawful and equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees

> and orders of the State courts. Unless Congress has removed such immunity by statutory enactment, the bar of immunity from suit still remains and any judgment or decree of the State court is ineffective as to the water right held by the United States. Congress has not removed the bar of immunity even in its own courts in suits wherein water rights acquired under State law are drawn in question. The bill (S. 18) was introduced for the very purpose of correcting this situation and the evils growing out of such immunity.

S. Rep. No. 755, 82d Cong., 1st Sess. 4-5 (1951); cited in *Colorado River Water Conservation District*, 424 U.S. at 810-811.

The United States cannot deny there is a waiver of immunity to the state laws in the second sentence of the Amendment, and therefore labors to limit the waiver to only one aspect of state water laws. The United States asks this Court to apply rules of statutory construction in an extremely convoluted manner, in order to conclude that the McCarran Amendment waives immunity only to "the body of substantive state laws governing 'acqui[sition of] water rights by appropriation.' " Brief for the United States at 24, quoting 43 U.S.C. § 666(a) (modification in original).

The United States bases its argument on the fact that there are two references to state laws in the McCarran Amendment: a reference to "State law" in the first sentence, which describes one of the types of water rights amenable to adjudication, and a reference to "the State laws" in the second sentence, which describes the laws that are applicable to the United States:

> Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under *State law*, by purchase, by exchange, or otherwise, and the United States is a necessary party to any such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that *the State laws* are inapplicable or that the United States is not amenable thereto by reason of its sovereignty. . . .

43 U.S.C. § 666(a) (emphasis added).

Nothing in the language Congress used limits the waiver to the laws described in the first sentence regarding appropriation of water rights. Indeed, the context indicates that Congress intended the two terms to refer to two separate sets of laws. *See King v. St. Vincent's Hospital*, 112 S. Ct. 570, 574 (1991) (the meaning of a statutory term is to be determined based on the context in which it is used). The first reference to "State law" is in the singular and is used as a modifier of the term "appropriation." In the context of the first sentence, it is clear that Congress used the term "State law" to describe one of the types of water rights subject to adjudication.

The second reference to "the State laws" is plural, and the term is used as a noun to describe the state laws applicable to the United States "when a party to any such suit [for the adjudication or administration of water rights]." There is no indication, other than the bare similarity in the words used, that "the State laws" in the second sentence refers to the term "appropriation under

State law" as used in the first sentence.[13] Based on context, the most natural reading of the term "the State laws" in the second sentence is to describe those state laws governing the procedures that the United States must comply with when joined as a party to an adjudication or administration suit. *See Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 111 S. Ct. 922, 931 (1991) ("[T]his Court will not reject the natural reading of a rule or statute in favor of a less plausible reading, even one that seems to us to achieve a better result.").[14]

In addition to the plain language of the statute, the legislative history convincingly demonstrates that Congress intended the United States to be subject to all state laws governing the conduct of water right adjudications. In previous decisions, this Court has turned directly to the legislative history to construe the McCarran Amendment.[15] *District Court for Eagle County*, 401 U.S. at 525;

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[13] The United States' argument ignores the fact that "[t]he same words may have different meanings in different parts of the same act. . . . " *Lamar v. United States*, 240 U.S. 60, 65 (1916).

[14] As an alternative argument, the United States asserts that if Congress did waive immunity to state adjudication laws, such waiver extends only to "necessary" state laws. Brief for the United States at 23. This interpretation is unsupported in both the text of the statute and the legislative history and should be summarily rejected by the Court.

[15] Resort to legislative history is not unusual in construing waivers of sovereign immunity. Although this Court has rejected attempts to use legislative history to supply the needed "unequivocal expression" of waiver of sovereign immunity, when such is missing in the text of the statute, see, e.g., *United States v. Nordic Village, Inc.*, 112 S.Ct. 1011, 1016 (1992), it has often referred to the legislative history of waivers of sovereign immunity that are unequivocally expressed to determine the intended breadth of the waiver. *See, e.g., Bowen v. Massachusetts*,

Colorado River Water Conservation District, 424 U.S. at 810-811. Most often, the Court has used the legislative history to determine the congressional policy underlying the McCarran Amendment, and then has construed the Amendment to effectuate that policy. *Colorado River Water Conservation District*, 424 U.S. at 820; *San Carlos Apache Tribe*, 463 U.S. at 570.

The Senate Report on the McCarran Amendment indicates that the purpose of the Amendment is to make the United States "amenable to the law of the State" regarding general stream adjudications to the same degree as all other water users. S. Rep. No. 755, 82d Cong., 1st Sess. 6 (1951). The Senate Report makes clear that the state laws the Congress intended the United States to abide by were not the state laws governing appropriation, but rather the state laws developed for the purpose of adjudicating water rights:

> Litigation with respect to the water rights developed early in the history of the right to the use of water by appropriation. Down through the years the courts of the respective States marked out the pathway whereby order was instituted in lieu of chaos
>
> . . . .
>
> . . . *In the administration of and the adjudication of water rights under State laws* the State

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487 U.S. 879, 896-900 (1988); *Franchise Tax Board of California v. United States Postal Service*, 467 U.S. 512, 520 & n.13 (1984); *United States v. Mitchell*, 463 U.S. 206, 213-15 (1983). The Court has also stated that "waiver of sovereign immunity is accomplished not by 'a ritualistic formula'; rather intent to waive immunity and the scope of such a waiver can only be ascertained by reference to underlying congressional policy." *Franchise Tax Board*, 467 U.S. at 521 (citation omitted).

courts are vested with the jurisdiction necessary for the proper and efficient disposition thereof, and by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights.

. . . .

. . . If a water user possessing a decreed water right is immune from suits and proceedings in the courts for the enforcement of valid decrees, *then the years of building the water laws of the Western States* in the earnest endeavor of their proponents to effect honest, fair and equitable division of the public waters *will be seriously jeopardized.*

. . . .

Since it is clear that the States have the control of the water within their boundaries, it is essential that each and every owner along a given water course, including the United States, *must be amenable to the law of the State,* if there is to be a proper administration of the water law as it has developed over the years.

S. Rep. No. 755, 82d Cong., 1st Sess. 3-6 (1951) (emphasis added). The Committee's primary concern was to preserve and protect the unique laws each state had developed for the general adjudication and administration of water rights. Indeed, the United States Department of Justice recognized this distinction when the McCarran Amendment was being considered by Congress. Mr. Veeder, who represented the United States Department of Justice in hearings on S. 18, stated:

> You have a general waiver of immunity for every water right in the United States. You not only have a waiver of immunity, you subject us to the administration of every State. *We would be forced – I went back and checked this when I got through with my last conversation with you – we would be forced to have 17 different procedures west of the one hundredth meridian in which to try our litigation.*

A Bill to Authorize Suits Against the United States to Adjudicate and Administer Water Rights, Hearings on S. 18 Before a Subcommittee of the Senate Committee on the Judiciary, 82d Cong., 1st Sess. 14 (1951) (emphasis added).

The United States' assertion that the second sentence of the McCarran Amendment only waives immunity to substantive state laws regarding perfection of appropriative water rights is not only inconsistent with this Court's prior decisions but, in fact, nonsensical. The McCarran Amendment does not create water rights but rather addresses the procedure for verifying existing rights. If the United States desires to aquire a water right pursuant to state law, it must necessarily follow state law because state appropriation laws define the right and the circumstances under which it may be obtained.[16] The application of state appropriation laws

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[16] The United States' assertion that the McCarran Amendment only waives federal immunity as to substantive state laws governing acquisition of state water rights does not relieve the United States from paying filing fees for water rights acquired under state law. Water rights held by the federal government pursuant to state law are subject to state laws that condition the retention of such property interests on "the performance of reasonable conditions that indicate a present intention to retain the interest." *Texaco, Inc. v. Short,* 454 U.S. 516, 526 (1982). Such conditions may include requirements that owners file notices of intent to hold the property when the state so requires. *Id.* at 529-30; *United States v. Locke,* 471 U.S. 84, 104 (1985). Failure to do so may result in forfeiture of the property interest. These provisions are especially applicable to unique property interests wherein the state retains significant interests in the underlying property. *Locke,* 471 U.S. at 104. Such is the case with water rights, which are subject to state control in the state's sovereign capacity as representative of all the people. *Walbridge v. Robinson,* 22 Idaho 236, 241-42, 125 P. 812, 814 (1912).

occurs by the United States' voluntary application for a water right and continues so long as the right continues to exist. Thus, an additional waiver to state appropriation laws in the context of a general stream adjudication is unnecessary. In essence, the effect of the United States' interpretation of the McCarran Amendment is to render the waiver to "the State laws" meaningless.

If this Court were to adopt the United States' position that the waiver to state laws applies only to those laws governing appropriation of water rights, the practical effect would be that the United States, once joined in a general stream adjudication, would comply only with state adjudication procedures it found not to be "objectionable."[17] Brief for the United States at 21. Chaos would result from this unworkable standard as the United States decided which procedures applied to it in each state and

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Water rights held under Idaho law are subject to statutory conditions: when required, the owner of the right must file a notice of claim in a general stream adjudication and pay the required filing fee. *See Idaho Code* §§ 42-237f, 42-1408A (1990 & Supp. 1992). A waiver to substantive state laws governing the acquisition of state water rights necessarily subjects the United States to such conditions the same as any private claimant. Thus, even under the United States' analysis, the United States must file notices of claim for water rights acquired under state law in accordance with the conditions specified by the state, including payment of adjudication filing fees.

[17] The United States Department of Justice, in opposing the McCarran Amendment, referred to the general waiver of immunity as "objectionable." S. Rep. No. 755, 82d Cong., 1st Sess. 7 (1951). Congress nonetheless overrode the Department of Justice's objections and enacted the McCarran Amendment as a general waiver of immunity. By asserting that it retains the right not to comply with "objectionable" procedures, the United States is attempting to resurrect the argument it lost in Congress as a substantive element of the waiver. This Court should reject the attempt.

even among adjudications within the same state. For instance, the United States might object to procedures such as deadlines for filing claims, objections and responses, evidentiary exclusions, discovery requirements or state law requirements regarding finality of judgments. *See Nevada v. United States*, 463 U.S. 110 (1983) (res judicata applies to bar the United States' attempt to reassert claim which was not filed by the United States on behalf of Indian Tribe). The eventual outcome would be two different sets of adjudication procedures in each adjudication: one set for the United States and one set for all other claimants. The United States could stall or disrupt the very proceedings Congress directed the government to participate in. This outcome would be in direct conflict with Congress' recognition that "comprehensive state systems for adjudication of water rights" are the best forum for quantifying all water right claims. See *Colorado River Water Conservation District*, 424 U.S. at 819.

1. Idaho's Filing Fee Is Part of the State's General Stream Adjudication Procedure and Therefore Comes Within the Scope of the McCarran Amendment Waiver.

The Court's prior decisions suggest the test for determining whether a specific state adjudication procedure is applicable to the United States: so long as the procedure is part of a "comprehensive state system" for the adjudication of water rights, the procedure is within the scope of the waiver. *See, e.g., Water Division No. 5*, 401 U.S. at 529; *Colorado River Water Conservation District*, 424 U.S. at 819; *San Carlos Apache Tribe*, 463 U.S. at 552.

If this test is applied to Idaho's filing fees, it must be concluded that the fees are part of Idaho's "comprehensive state system" for adjudication of water rights. The

filing fees are pivotal to the Idaho system of adjudication. The fees allow the state to centralize crucial procedures in a neutral, quasi-judicial entity. The IDWR perfects service to ensure that persons, parties and non-parties are bound by the decree. The IDWR also gathers all the claims, standardizes the information contained therein, compares the information to existing documentation of water rights, investigates discrepancies, and summarizes all information in a single source: the director's report. U.S. Exh. 3006 at 2-7. Such centralization of procedures provides services that could not be economically duplicated by the individual claimants:

> The usual comprehensive general adjudication statute provides for the state water administrative official to make a hydrographic survey of the river system. This survey generally involves identifying and measuring the sources of water and requires on-ground surveys to identify the points of diversion, irrigated acreage, and the location of storage reservoirs, canal systems, and other similar features.
>
> While it would be possible for each litigant to retain engineers and submit the evidence on his tract of land in the traditional contested lawsuit, it is unlikely that any one litigant could afford or justify a comprehensive survey of the whole river system. To get a comprehensive survey of the system, it is better to have the survey made by the state water administrative official.

C. Peter Goplerud III, *Adjudication of Water Rights*, in 2 WATERS AND WATER RIGHTS, § 15.02(b) at 229 (Robert E. Beck ed., 1991) (footnotes omitted).

The preparation of the director's report also serves to separate contestants from non-contestants, which frees

the court and the individual parties from having to do so through time-consuming litigation. *Id.* at 211.

Idaho would have to develop an entirely different system for the adjudication of water rights in the Snake River Basin if filing fees could not be imposed upon the United States. The system would be decentralized, placing a greater burden on the court and claimants to develop the information necessary to determine the 120,000 water rights at issue in the SRBA. In many instances, claimants would have to prove their water rights through expert testimony and exhibits. Small claimants would not be able to effectively participate because of the cost. Ultimately, the adjudication would become a forum in which only the rich could fully participate and the court would be confronted with the interpretation of state records by the major litigants without the full benefit of the state's expertise.

In the Montana adjudication, contrary to its present position before this Court, the United States admitted that the kinds of centralized services provided by Idaho and other states are an essential element of general stream adjudications. *See* Brief for the United States at 35-37.

> The United States is the largest single water claimant in the Montana adjudication, with over 32,000 water claims filed to date. In addition, in order to protect our extensive water rights for federal and Indian reservations, we have filed over 4,300 objections to claims listed in temporary preliminary decrees. Given the scope of the United States' water interests in the state, and the volume of its objections, the United States cannot be reasonably expected to investigate every water claim which might infringe on federal or Indian rights. The sheer number of filed

> claims and the size of many water basins creates an unmanageable situation for nearly all water users. Without DNRC[18] assistance most water users, who usually appear *pro se*, will not have the resources to make informed objections in the adjudication. DNRC performs a vital role in signalling to water users which claims are suspect and possibly worth challenging. In addition, the expertise of that agency is critical in providing information to the Water Court for use in all phases of the adjudication.

Brief in Support of Motion for Comparison Reports and Reverification at 27, *In the Matter of the Adjudication of the Existing Rights to the Use of All the Water, Both Surface and Underground, Within all Water Basins in the State of Montana,* (No. WC-88-1) (hereafter "United States' Montana Brief") (emphasis in original) (footnote omitted).[19]

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[18] Montana's Department of Natural Resources and Conservation performs a function substantially similar to the IDWR. *See* Montana Code Ann. Title 85, chap. 2, part 2.

[19] The State of Idaho discovered a copy of this brief for the first time when preparing this Response. Since it is an official pleading of the United States, this Court may take judicial notice of the brief. Federal Rule of Evidence 201; 9 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 2410 (1971). This brief demonstrates the obstacles the United States continually throws in front of state court adjudications. If the Court strikes down Idaho's filing fees, the next appeal will be the United States' objection to the SRBA because the procedures are burdensome and Idaho is not providing adequate service. In the Montana adjudication, the United States asserted that: "[B]udgetary restrictions cannot justify an inadequate claims examination process. Under the 'adequacy' standards of the McCarran Amendment, one arm of the state (the judiciary) may not excuse an inadequate adjudication by pointing to the failure of another arm (the legislature) to appropriate funds." United States' Montana Brief at 31. The entire brief is attached as an appendix to this Brief.

This Court also has had occasion to review the need for the type of centralized administrative services provided by the IDWR, as well as the propriety of charging filing fees to finance such services. In *Pacific Live Stock Co. v. Lewis*, 241 U.S. 440 (1916), the Court reviewed a due process challenge to adjudication filing fees that were used to pay the expenses of an administrative board that notified claimants, took statements of claim, received evidence, and made an advisory report to the court. *Id.* at 451.

The fees at issue in *Pacific Live Stock* were substantially similar to the Idaho filing fees. There was a fixed fee of one dollar and an additional variable fee for each acre of irrigated land. Hydropower claimants also paid variable fees depending on the number of theoretical horsepower generated by their facility. All other claimants paid a fee of five dollars. *Pacific Livestock v. Cochran*, 73 Or. 417, 144 P. 668, 672 (1914). The Court held that such fees were appropriate for a general water rights adjudication: "That these services are beneficial to the claimant and necessary to the preservation of his rights in the stream and the protection and assurance of his title goes without saying." 241 U.S. at 452 (quoting *Pacific Livestock Co. v. Cochran*, 144 P. at 672). This case was prominently quoted in the Senate Report on the bill that later became the McCarran Amendment to describe what constituted a

"general adjudication." S. Rep. No. 755, 82d Cong., 1st Sess. 5 (1951).[20]

The *Pacific Live Stock* decision confirms that filing fees have long been understood to be a necessary element of many state adjudication statutes. The United States has apparently recognized this fact, as demonstrated by its payment of filing fees in general adjudications in the states of Arizona, California, Colorado, Idaho, Montana, Nevada, and Oregon.[21] R. 57-58, 92-106, 150-153, 158-60,

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[20] This Court has upheld other filing fees imposed to finance specialized adjudicatory systems. In *United States v. Kras*, 409 U.S. 434 (1973), the Court approved the imposition of filing fees as a condition precedent to a discharge in voluntary bankruptcy. The fees were determined to have a rational basis, since Congress "sought to make the system self-sustaining and paid for by those who use it rather than by tax revenues drawn from the public at large." 409 U.S. at 447-48. *Cf. Ortwein v. Schwab*, 410 U.S. 656, 660 (1973) (upholding Oregon appellate filing fee as rationally related to state's goal of offsetting operating costs of court system).

In *United States v. Sperry Corp.*, 493 U.S. 52 (1989), the Court upheld a user fee imposed to cover the United States' costs associated with establishing the Iran-United States Claims Tribunal, which arbitrated claims brought by Americans against the government of Iran. The *Sperry* decision is especially instructive, since the arguments made by Sperry in that case parallel those made by the United States in the present case. Sperry argued that the United States was "charging it for the use of procedures that it has been forced to use, or at least that it would rather not have used." 493 U.S. at 63. The Court responded that the mere existence of the Tribunal was of benefit to Sperry, since without it Sperry would have had to proceed through the federal court system, and would have had no assurance that any judgment it obtained "would have been readily collectible." *Id.*

[21] The United States paid some of these fees under protest. *See e.g.*, R. 45-47, 116, 118.

195, 608-16. The United States has characterized these as "de minimus assessments." Reply Brief for the United States at 9 (on petition for writ of certiorari). In some cases, however, the fees amounted to several hundred thousand dollars.[22] If, as the United States asserts, sovereign immunity bars the assessment of adjudication filing fees, then payment of the fees without explicit congressional authorization would have violated the well-established principle that neither the attorney general nor other federal officials have the authority to waive the sovereign immunity of the United States. *Stanley v. Schwalby*, 162 U.S. 255, 270 (1896). The necessary implication of such payments is that the Department of Justice and other federal agencies have recognized the McCarran Amendment as authority for the payment of adjudication filing fees.[23]

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[22] The total fees paid by the United States in Arizona adjudications is approximately $320,000. R. 610.

[23] Indeed, specific acts of Congress authorize the United States to pay filing fees. For example, section 8 of the Reclamation Act of 1902 provides, in part:

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws. . . .

43 U.S.C. § 383 (1988). Obviously, state laws governing the conduct of adjudications are state laws "relating to the control, appropriation, use, or distribution of water." Section 8 therefore requires that water rights held by the Bureau of Reclamation be adjudicated in accordance with state laws.

Contrary to the United States' assertion, assessment of adjudication filing fees against the federal government will not substantively impact federal water rights claims. The filing fees are assessed on a per claim basis. As a result, they will always be limited simply because the number of claims filed by the United States must be finite. Adjudication filing fees are also limited by the McCarran Amendment's requirement that the United States be joined in only general adjudications. This requirement avoids application of state laws that are not rationally related to the adjudication of water rights. Those laws will necessarily apply equally to a host of differing claimants, whether private, state or federal. Thus, any attempt to increase the fees of the United States would raise the fees of other parties to the adjudication.[24]

Congress has supplied the necessary authorizations to federal agencies to spend money in order to comply with state water laws. Section 17j-2 of Title 16, U.S. Code, provides:

> Appropriations for the National Park Service are authorized for –
>
> . . . .
>
> (g) Investigation and establishment of water rights in accordance with local custom, laws, and decisions of courts, including the acquisition of water rights
>
> . . . .

A similar provision applies to the U.S. Forest Service. 16 U.S.C. § 526 (1988).

[24] The variable filing fees provided in Idaho Code § 42-1414 are non-discriminatory because they apply to "uses" rather than particular claimants. The United States is not singled out for application of special fees. Indeed, any fees applicable to the United States are also applicable to the state. The clearest example of this point is the fees for public instream flows, public lake levels maintenance and wildlife. I.C. § 42-1414(2)(c) (1990). Claims for such rights will be made by the Idaho Department of Parks and Recreation, the Idaho Water Resources Board, and the

Together, such limits on state procedures fully address the United States' concerns that state procedures may "trench upon important federal interests." Brief for the United States at 21.

As shown above, Congress intended for the United States to comply with comprehensive state adjudication procedures. Congress was also aware that these procedures generally required the state to provide certain centralized services and that fees were charged for these services. Since Idaho's filing fees support these same types of services, they come within the scope of the McCarran waiver of sovereign immunity.

2. The Services Financed By Idaho's Adjudication Filing Fees Benefit All Claimants, Including The United States.

Throughout its brief, the United States attempts to portray itself as an unwilling participant in the SRBA, and the services financed by Idaho's adjudication filing fees as being unnecessary and of little or no benefit to the United States. Brief for the United States at 12-13, 35-37. While Idaho believes that these factual assertions have no bearing on the proper interpretation of the McCarran Amendment, it should be understood that the assertions are not correct.

The genesis of the SRBA was a technical study committee appointed by the Governor in 1983. The technical study committee included, among others, representatives of the United States Department of the Interior Bureau of Reclamation and the United States Geological Survey.

Idaho Department of Fish and Game. The total fees for these agencies will be over $4 million. R. 200-02. Thus, Idaho has no incentive to make fees for such claims disproportionately large.

This committee unanimously recommended the initiation of the SRBA. SOF at 2-3.

More so than other claimants, the United States will receive special benefits from the completion of the SRBA. Federal water rights for over 23 million acres of federal land in the Snake River Basin are presently unquantified, and thus are not fully integrated into the state system for distribution of water, although they will comprise at least one-fourth of the claims in the SRBA. As other courts have noted, this "creates an undesirable, impractical and chaotic situation," *United States v. District Court for Eagle County*, 458 P.2d 760, 765 (Colo. 1969), *aff'd*, 401 U.S. 520 (1971), in which the needs of federal reservations may go unfulfilled. Once federal reserved water rights are quantified in the SRBA, however, state water masters will distribute water for these federal needs. Tr. 991. Thus, the IDWR's efforts to facilitate the conclusion of the SRBA through centralization of adjudication procedures will unquestionably benefit federal agencies and Indian tribes holding reserved water rights.

In addition to the general benefits the United States will receive from adjudication of its water rights, it receives specific benefits from the centralization of adjudication services by the IDWR.[25] Without such procedures the United States would have to proceed on a

[25] Federal reserved water rights are abstracted based upon a state legislative accommodation to the federal government. The fact that federal reserved water rights are abstracted in the director's report, instead of being recommended by the director, does not diminish the benefit the United States receives from the adjudication. The primary benefit of the director's report is not the information it contains regarding one's own claims, but the information it provides regarding the claims of others. Additionally, the fact that reserved rights are abstracted in the

piecemeal basis, which would substantially increase its litigation costs.

After reviewing the benefits the United States will receive during the course of the SRBA, the district court concluded as follows:

> The filing fee is a reasonable charge assessable upon an "identifiable receipt for a measurable unit or amount of governmental service or property from which he derives special benefit." *Federal Power Commission v. New England Power Company*, 415 U.S. 345, 349, 94 S. Ct. 1151, 1154 (1974). The ultimate beneficiary, the United States, is well served by having its water rights administered and adjudicated. This benefit is not obscure and the service which the United States receives, the quantification and prioritization of its water rights, cannot be "primarily considered as benefiting broadly the general public." *Id.; See also, National Cable Television Association v. United States*, 415 U.S. 336, 94 S. Ct. 146 (1974).

Memorandum Decision, April 11, 1991; Pet. App. 111a-112a.[26]

report does not affect other benefits, such as not having to serve process on other claimants.

[26] The trial court's factual determination that each claimant receives a specific benefit from the services provided by the IDWR was not disturbed on appeal, and likewise should not be disturbed by this Court. *See Rogers v. Lodge*, 458 U.S. 613, 623 (1982).

Additionally, the factual record undercuts the United States' alternative argument that even if Congress waived immunity to "necessary" state laws, Idaho's filing fees are not "necessary" to the successful completion of the SRBA. Brief for the United States at 23. The record shows that the services provided by the filing fees permit claimants, including the United States, to more effectively assert and protect their water right claims, by providing them with unbiased information and technical analysis regarding the hydrology of the basin as well as individual water right claims. The need for such information and analysis is absolutely necessary, and laws designed to facilitate the availability of such information are exactly the types of laws Congress had in mind when it enacted the waiver in the McCarran Amendment.

II. IDAHO'S FILING FEE IS NOT A "JUDGMENT FOR COSTS" PROHIBITED BY THE MCCARRAN AMENDMENT.

The United States attempts to portray the adjudication filing fee as a "judgment for costs" in order to bring it within the single exception to the general waiver of sovereign immunity in the McCarran Amendment. The Amendment states: "Provided, That no judgment for costs shall be entered against the United States in any such suit." 43 U.S.C. § 666(a). The United States' argument is not supported in law or fact.

The Court has recognized that when Congress enacts a sweeping waiver of sovereign immunity, such as the McCarran Amendment, exceptions to the waiver should be construed narrowly.

> We have on occasion narrowly construed exceptions to waivers of sovereign immunity where that was consistent with Congress's clear intent, as in the context of the "sweeping language" of

> the Federal Tort Claims Act . . . or as in the context of equally broad "sue and be sued" clauses. . . .

United States v. Nordic Village, Inc., 112 U.S. 1011, 1014 (1992).

When construing exceptions to sweeping waivers of immunity, "unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute." *Kosak v. United States*, 465 U.S. 848, 853 n.9 (1984). The "proper objective" of the Court when construing exceptions to a broad waiver of immunity "is to identify 'those circumstances which are within the words and reason of the exception' – no less and no more." *Id.*, quoting *Dalehite v. United States*, 346 U.S. 15, 31 (1953). *See also United States v. Yellow Cab Co.*, 340 U.S. 543, 548 n.5 (1951).

Application of these rules of construction leads to the conclusion that the prohibition against "judgments for costs" does not extend to the type of adjudication filing fees required by Idaho law. The distinction between costs and fees is well established:

> "Costs" refers to those charges that one party has incurred and is permitted to have reimbursed by his opponent as part of the judgment in action. . . . "Fees" are those amounts paid to the court or one of its officers for particular charges that typically are delineated by statute.

10 WRIGHT, MILLER AND KANE, FEDERAL PRACTICE AND PROCEDURE, § 2666 (1983) ("Costs, Fees, and Expenses Distinguished"), *cited in Library of Congress v. Shaw*, 478 U.S. 310, 321 (1986). Costs are thus in the "nature of incidental damages allowed to indemnify a party against the expense of successfully asserting his rights in court." 20 C.J.S. Costs § 2 (1990). Fees "are compensation to public

officers for services rendered individuals, in the progress of the cause." *Id.* § 3.

Given the historic distinction between costs and fees, the filing fees required by Idaho Code § 42-1414 do not fall within the "judgment for costs" exception to the McCarran Amendment waiver. The fees bear no resemblance to "costs," since they are not used to indemnify the successful adversarial litigant. The filing fees instead fit squarely within the traditional definition of fees. *See Sperry* and *Kras, supra* at n.20. They are used to fund the expenses of the courts overseeing the adjudication, and the expenses of the services that the IDWR renders in progress of the adjudication. *See* Idaho Code § 42-1777 (1990).

Indeed, the adjudication statutes in existence in 1952 distinguished between fees and costs. Filing fees were a substantial source of adjudication funding for some states. The United States implies that at the time of passage of the McCarran Amendment, other western states, including Senator McCarran's home state of Nevada, only funded their adjudications with judgments for cost. Brief of the United States at 30, n.12. This argument is based upon a mischaracterization of the general adjudication statutes in Arizona, Oregon and Nevada.

Many western state statutes at the time of enactment of the McCarran Amendment included provisions for either filing fees or apportionment of expenses, or both, as funding mechanisms for general adjudications. The adjudication provisions associated with the State of Nevada, Senator McCarran's home state, specifically provided for a graduated filing fee like Idaho's present statute, as well as judgments for costs. Nevada Compiled Laws §§ 7914, 7930 (1929) (Idaho Exh. 252). Arizona and

Oregon also received substantial funding for general stream adjudications from graduated filing fees. Arizona Code of 1939 § 75-137 (Idaho Exh. 243); Act of March 6, 1947, Ch. 88, § 2, 1947 Or. Laws 99, 100 (Amending Oregon Compiled Laws Annotated § 116-807) (Idaho Exh. 262). California, Colorado, and Washington charged a flat fee for filing a notice of claim. Brief of the United States 30, n.12.[27]

Congress and the United States Department of Justice were certainly aware of this distinction. When Mr. Veeder, Special Assistant to the Attorney General, testified

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[27] The United States mischaracterizes the Arizona, Nevada and Oregon adjudications when it attempts to distinguish between the initial administrative activities and the judicial proceedings in their adjudications. Brief of the United States at 30, n.12. Adjudications in those states often started with significant quasi-judicial administrative investigations which narrowed the issues; however, the adjudication was finalized by judicial proceedings. Arizona Code of 1939 §§ 75-114 -127 (Idaho Exh. 243); Nevada Compiled Laws §§ 7905-7929 (1929 & Supp. 1942) (Idaho Exhs. 252, 253); Oregon Compiled Laws Annotated §§ 116-801 through -823 (1940) as amended by Act of March 6, 1947, Ch. 88, § 2, 1947 Or. Laws 99, 100 (Idaho Exhs. 261, 262). The only distinction, and this is not a significant difference, is that the judiciary did not take jurisdiction until after the administrative activities, rather than before, as it does in Idaho.

Further, the United States failed to inform the Court that the Oregon system, including its administrative component, has specifically been held to constitute a "suit" under the McCarran Amendment. *United States v. Oregon Water Resources Dept.*, 774 F. Supp. 1568, 1575-1576 (D. Or. 1991). When construing "sue and be sued" clauses, the Court has recognized that the governmental corporation has been "sued" when subjected to administrative process. *Franchise Tax Board of California v. United States Postal Service*, 467 U.S. 512, 525 (1984).

before the Subcommittee of the Committee on the Judiciary of the United States Senate, he stated that he had checked the state laws and that the United States "would be forced to have 17 different procedures west of the one hundreth meridian" to try its litigation if Senate Bill 18 was enacted. *A Bill to Authorize Suits Against the United States to Adjudicate and Administer Water Rights, Hearings on S. 18 Before A Subcommittee of the Senate Committee on the Judiciary*, 82d Cong., 1st Sess. 14 (1951). Further, the Senate Report on S. 18 focused heavily on *Pacific Live Stock*, a case involving adjudication filing fees, *supra*. Despite its awareness of the distinction between filing fees and "judgment for costs," Congress chose to except only "judgment for costs."

A further distinction is that no "judgment" is involved in collection of the fees. The filing fees must accompany the initial filing of a notice of claim. Idaho Code § 42-1414 (1990). The fees do not depend on the entry of the state court's "judgment" and therefore are unlike "costs," which are awarded only upon issuance of a judgment and the determination of who is the prevailing party. 10 WRIGHT, MILLER & KANE, FEDERAL PRACTICE & PROCEDURE §§ 2666, 2667 (1983). Thus, a plain reading of the "judgment for costs" proviso requires that the fees fall outside the proviso.

The United States, however, labors to portray the fees as a "substitute" for costs by casting the IDWR and the United States as adversarial parties in the SRBA. In order to portray the IDWR and the United States as adversaries, it attempts to convince the Court that Idaho's filing fees will be used to fund adversarial litigation activities. Brief for the United States at 8-9. The United States goes so far as to assert that "the Director will actually employ the filing fees paid by the United States to fund, among other

things, challenges to the United States' water right claims." Brief for the United States at 37.

The assertions of the United States are not relevant to this proceeding nor are they supported by either the record[28] or the decisions below. Use of the filing fees is limited by Idaho Code 42-1777 and the law of the case. The district court carefully examined expenditures from the adjudication account during a three-day trial, and concluded as follows:

> The main thrust of the United States' argument is that counsel and staff to the Director serve in a capacity which is adversarial to theirs. However, in using the term "adversarial," care must be taken in its application to the adjudication process. When the Director is performing a duty which is part of the administration of the adjudication as set out in the statutes, he is entitled to have staff support to assist in the performance of those duties. Where the Director or his staff perform acts which are reasonably and rationally related to his statutory duties, costs associated with the performance of those duties may be born [sic] by the adjudication account. *In so far as the activities of the Director*

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[28] In its brief, the United States makes numerous citations to the record in support of its statement that the filing fees pay "various litigation costs that the State incurs in challenging [water right] claims." Brief for the United States at 9. The cited portions of the record, however, make no mention of state *challenges* to water right claims, but describe expenses the IDWR will incur in defending the director's report. *See* U.S. Exh. 3006, at 2-10, 51-55; R. 423-424; Tr. 376, 378-381, 384-385, 390-91, 396-398, 547-553, 595. In fact, Dave Shaw, the chief of the IDWR adjudication bureau, expressly testified that if the IDWR objects to federal reserved claims, costs associated with such objections would not be billed to the adjudication account. Tr. 382, 386, 396.

> *and any expenditures made on behalf of those activities are reasonably and rationally related to his duties under the adjudication statutes, he is neither an adversary nor an adversarial party. In performing his duties leading to the issuance and filing of the Director's report, he acts in a quasi-judicial capacity.* When the Director proceeds outside his quasi-judicial statutory capacity, and becomes a party opponent in this litigation matter, costs associated with such efforts become a general revenue obligation of the state.

Memorandum Decision, April 11, 1991; Pet. App. 107a-108a (emphasis added).

Likewise, the Idaho Supreme Court reviewed Idaho adjudication statutes and found that the Director's role in the adjudication is not analogous to that of a traditional adversarial party:

> A general water adjudication brought by the state is analogous to an interpleader action. . . . The position of the director of the Department of Water Resources is analogous to the "stakeholder" in an interpleader action. The director is really a disinterested party. The only interest the director has is to see that all rights are accurately adjudicated.

Pet. App. 15a-16a (citation omitted).

The determinations of the district court and Idaho Supreme Court regarding the IDWR's role under state statutes are binding on the parties. Despite the United States' attempt to reopen the issue, the state courts' determinations regarding the non-adversarial role of the IDWR under state law are not subject to further review. *See, e.g., Garner v. Louisiana,* 368 U.S. 157, 169 (1961) (state supreme courts "have the final authority to interpret . . . that state's legislation.").

The fact that Idaho's filing fees are used to support quasi-judicial services brings them squarely within the waiver of the McCarran Amendment. There is no indication, either on the face of the statute or in the legislative history, that Congress intended to include such fees within the prohibition against "judgment for costs." Indeed, every indication is that Congress expected such fees to be assessed as a common feature of adjudication laws. Congress cited the *Pacific Live Stock* as the preeminent description of adjudication procedures, and *Pacific Live Stock* emphasized the need for adjudication filing fees. In addition, the Senate Report explaining S. 18 noted that states commonly required graduated annual fees for the service of water commissioners who apportion water to decreed water users. S. Rep. No. 755, 82d Cong., 1st Sess. 5 (1951). Despite its awareness that states often associated fees with the adjudication and administration of water rights, Congress carefully chose to limit the exception in the McCarran Amendment to "judgment for costs." This Court must adhere to the narrow language used in the exception, and refuse the invitation of the United States to expand the exception beyond the bounds contemplated by Congress.

CONCLUSION

The judgment of the Idaho Supreme Court should be affirmed.

Respectfully submitted,

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APPENDIX

IN THE WATER COURTS OF
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IN THE WATER COURTS OF
THE STATE OF MONTANA

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IN THE MATTER OF THE)
ADJUDICATION OF THE)
EXISTING RIGHTS TO THE)
USE OF ALL THE WATER,)
BOTH SURFACE AND)
UNDERGROUND, WITHIN)
ALL WATER BASINS IN THE)
STATE OF MONTANA.)
_____)

BRIEF IN SUPPORT OF MOTION FOR COMPARISON REPORTS AND REVERIFICATION

I. INTRODUCTION

Through the motion accompanying this brief, the United States has moved this Court for an order requiring

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Please note: any misspellings throughout the appendix have intentionally been left that way to show how it actually appeared in the original document.

the DNRC to (1) issue reports comparing the effects of applying the previous verification procedures with the effects of applying the current Water Right Claims Examination Rules in those basins for which temporary preliminary or preliminary decrees have been entered, and (2) conduct reverification, employing the new Claims Examination Rules, in those basins for which comparison reports have been prepared to date. Below, we set forth the reasons supporting this relief.

II. STATEMENT

A. *Background of Stipulation and Claims Examination Rules.* – In 1985, the United States and other water claimants filed petitions for writs of supervisory control which complained of, *inter alia*, inadequate verification of claims by the DNRC. Specifically, the United States alleged in Count I of its petition for writ of supervisory control in *United States* v. *Water Court*, No. 85-493, that the Water Court had failed to develop sufficient verification procedures for various nonirrigation claims, notably mining use claims. (See U.S. Brief in Support of Petition in No. 85-493, pp. 4-6.) This contention was also advanced by the state's own Department of Fish, Wildlife and Parks (DFWP), which alleged in Count VII of its petition that "[t]he Water Court's failure to develop and apply proper verification procedures as described [elsewhere in the petition] will result in exaggerated or invalid water right claims being granted in the final decrees." (See DFWP Petition for Writ of Supervisory Control, Etc., in *Montana*

Dept. of Fish, Wildlife and Parks v. *Water Court*, No. 85-345, p. 24, para. 94.)[1]

The verification issues raised in the United States' and DFWP's petitions were not resolved by a decision of the Montana Supreme Court. Instead, the United States, DFWP, and other parties entered into a Stipulation with the Water Court which was designed to address verification problems, among others. The Stipulation was filed with the Supreme Court on February 19, 1986. On the strength of the Stipulation, the United States and DFWP moved to voluntarily dismiss their petitions without prejudice pursuant to Mont. Rule App. Civ. P. 36. The Montana Supreme Court has not, to date, entered an order dismissing the petitions.

The Stipulation, at pp. 9-13, embodied the parties' agreement on the verification of claims. The Stipulation provides that, if certain conditions are met, the Water Court shall issue an order "that applies to any basin or subbasin authorizing DNRC to conduct field investigations where DNRC or the Water Court finds an investigation necessary to achieve the accuracy of the adjudication." (Stipulation, para. 26 B., C., pp. 10-11.) Paragraph 30 of the Stipulation provides for retroactive application of the verification procedures adopted pursuant to the Stipulation in those basins where temporary preliminary or preliminary decrees have been issued. In those basins, para. 30 requires the DNRC to file a report

[1] The original "verification manual" for water right claims had been devised by the Water Court with input from DNRC, and contained legal rulings, Water Court procedures, as well as technical materials and procedures of DNRC.

with the Water Court "comparing the previous verification procedures with the verification procedures adopted pursuant to this Stipulation." (Stipulation, p. 12.) Thereupon, the Water Court on its own motion, or on the request of any person including the DNRC, may order the DNRC to apply the verification procedures adopted pursuant to the Stipulation to any of those basins. The Water Court is to grant such requests "upon good cause shown" (Stipulation, pp. 12-13).

Paragraph 43 of the Stipulation (pp. 17-18) provides that in the event revised verification procedures are retroactively applied to basins in which temporary preliminary or preliminary decrees have been issued, prehearings and hearings shall be reopened to consider additional evidence produced as a result of DNRC's verification of affected claims. In paragraph 47 of the Stipulation, the parties reserve the right "to take appropriate legal action to enforce the terms of this Stipulation or to ensure that accurate and legally defensible decrees will be issued" (Stipulation, p. 19).

Following the agreement of the parties to the Stipulation, DNRC proceeded to draft new claims examination procedures. At this point, the Water Court and the DNRC became involved in a dispute over the manner in which the revised verification procedures contemplated by the Stipulation were to be developed. Specifically, DNRC contended that the rules should be promulgated under the Montana Administrative Procedures Act (MAPA), Title 2, Chapter 4, M.C.A. (1984), and the Water Court disagreed. By orders of July 23 and August 8, 1986, the Water Court prohibited DNRC from following the MAPA process of developing the claims examination rules.

DNRC (along with the Montana Board of Natural Resources and Conservation, or BNRC) appealed these orders to the Montana Supreme Court, which by decision of March 31, 1987, held that MAPA did not govern the promulgation of claims examination rules. *In re Dept. of Natural Resources and Conservation*, 740 P.2d 1096 (1987). Instead, the Supreme Court stated that it would exercise its discretionary power under § 3-7-103, M.C.A., to promulgate the rules itself. On July 7, 1987, the Supreme Court issued water rights claims examination rules reflecting input from both the Water Court and the DNRC.

The Supreme Court noted that it was adopting, "practically without amendment or deletion," the rules suggested by DNRC for processing water claims once they are referred to DNRC by the Water Court for examination. (Exhibit A, Order Adopting Water Right Claim Examination Rules, filed July 7, 1987, pp. 3-4.) In other words, the verification rules for examining claims once they are referred to DNRC which were developed by DNRC pursuant to the Stipulation were, without substantial modification, issued by the Supreme Court. The Supreme Court's order also declared that the claims examination rules it was issuing "shall govern from [July 15, 1987] the practice and procedure respecting water claims examinations before the water court and DNRC," unless otherwise amended by the Supreme Court. (Order, p. 5.)

The Supreme Court in its July 7 order indicated that the Water Court possessed the authority to order application of the new claims examination rules to basins which had already been examined using the old "verification

manual," including basins in which temporary preliminary decrees have been issued. (Order, pp. 2-3.)

As noted above, the recently issued claims examination rules originated in the rules which were prepared by the DNRC pursuant to the Stipulation. The Chief Water Judge has indicated that he does not regard the Stipulation as binding, at least on the question of whether basins should be re-examined under the new verification procedures. (See Exhibit A-1, letter from Judge Lessley to Steven Brown, dated December 3, 1987; Exhibit B, letter from Judge Lessley to Steven Brown, dated December 11, 1986; Exhibit C, Letter from Judge Lessley to Gary Fritz, dated August 19, 1987, p. 2; Exhibit D, Order dated August 7, 1987, pp. 3-4.)

B. *Background Demonstrating the Need for Comparison Reports and Reverification.*

1. *Basins in which temporary preliminary or preliminary decrees have been entered.*

a. *Procedural background.* – As noted above, para. 30 of the Stipulation envisioned that DNRC, in those basins where temporary preliminary or preliminary decrees have been issued, "shall file a report with the Water Court comparing the previous verification procedures with the verification procedures adopted pursuant to this stipulation." (Stipulation, p. 12.) Thereupon, the Water Court may order DNRC "to apply the procedures adopted pursuant to this Stipulation to any of those basins," *i.e.*, to reverify those basins. (Stipulation, para. 30, pp. 12-13.) Thus, under the regime of the Stipulation, the production of a "comparison report" is the critical first step to obtaining reverification of a basin which is

the subject of a temporary preliminary or preliminary decree.

By letter dated July 29, 1987, DNRC informed Judge Lessley that, pursuant to the Stipulation, DNRC intended to complete the comparison reports for decreed basins before scheduling claim examination in non-decreed basins (Exhibit E, letter from Gary Fritz to Judge Lessley, pp. 1-2). In response, the Water Court issued an order dated August 7, 1987, which barred DNRC from preparing any comparison reports for decreed basins without the approval of the Water Court, and also directed DNRC to submit to the Court a list of previously decreed basins "in which the Department feels a comparison report should be considered by this Court." (Exhibit D, Order, p. 4.) By letter to Judge Lessley dated August 18, 1987, DNRC stated that a comparison report should be considered by the Court for every previously decreed basin (Exhibit F, letter from Gary Fritz, p. 4).

b. *The need for adequate verification in decreed basins.* – There is a need for adequate verification in at least some basins under temporary preliminary or preliminary decree, because of the large numbers of inflated and otherwise inaccurate claims filed in those basins. The United States believes that the practice of filing excessive and unsupported water claims has been widespread in this adjudication. Many claimants may have filed exaggerated claims under a misunderstanding of the function of a water claim. Some claimants may have believed that they were expected to claim all the water which they might need in the foreseeable future, as opposed to the water they have actually put to beneficial use.

The affidavit of United States Forest Service employee James Wardensky (Exhibit G) supports this view, as Mr. Wardensky states that he heard DNRC personnel advise potential water claimants to claim the maximum amount of water needed for future development of the claimants' land, instead of the amount of water actually being applied to the land. (*Id.*, pp. 1-2.) Claimants also told Mr. Wardensky that DNRC personnel had encouraged claimants to file on old claims without regard to whether water was being or had ever been used, and to request the maximum amount of water. (*Id.*, p. 2.)

Affidavits attached as exhibits to this brief indicate that there is a serious problem of inflated water claims in the temporary preliminary decrees of some basins:

(1) *Basin 41H (Gallatin River).* – The United States has reason to believe that many of the claims filed in the Gallatin Basin are excessive.[2] This conclusion is supported by computer analyses conducted by the United States Bureau of Reclamation (USBR) and the Bureau of Indian Affairs (BIA). These analyses focussed on the claims objected to by these federal agencies. The USBR analysis and supporting affidavit of Robert Pike is attached hereto as Exhibit I. That report discloses that USBR objected to 79 claims in Basin 41H, all of which had been the subject of "grey area remarks" by the DNRC (Exhibit I, p. 1). With respect to these claims, USBR compared the decreed acreage with (1) acreage verified by

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[2] The United States indicated the necessity of reverification in Basin 41H in a communication to the Water Court dated March 27, 1986. (See Exhibit H, letter from John Hill, counsel for the United States, to Judge Lessley, p. 2.)

DNRC from aerial photographs and (2) acreage verified from the Gallatin County Water Resources Survey by DNRC or USBR, or both. USBR discovered that irrigated acreage verified from aerial photographs for the claims reviewed averaged 58% less than the acreage claimed and decreed. The irrigated acreage verified by DNRC from the Water Resources Survey (published in 1953) averaged 85.3% less than the irrigated acreage claimed and decreed. *Id.*

The BIA investigation of claims to which that agency objected in the Gallatin Basin (and supporting affidavit of Douglas J. Oellermann) yielded similar results. Of the claims reviewed, decreed irrigated acres were reduced by an average of 38.8% when verified by DNRC utilizing aerial photographs, when one claimant's large acreage was removed from the analysis (Exhibit J, p. 4). The average reduction in decreed irrigated acreage when compared with the Water Resources Survey by BIA was 57.8% (*id*).

(2) *Basins 76B, C, D, E, K, L, M, N.* – The United States Forest Service has been investigating water right claims which could adversely impact the National Forests. The attached affidavits of Forest Service personnel demonstrate that there was a substantial number of inflated and otherwise inaccurate claims filed in several basins, including Basins 76 C, D, E, K, L, M, and N.

The affidavit of Regional Hydrologist Ronald L. Russell (Exhibit K) states that to date the United States has filed objections to 841 claims which mights adversely affect National Forest interests in 24 basins. The Forest Service's experience with 182 objections to claimed flow

rates illustrates the necessity of a more comprehensive and thorough claims examination process. Of these 182 objections, all but 28 were resolved by dismissal or withdrawal of the claims by the claimants, denial or dismissal by the Water Court for default, or reduction or modification by stipulation (*id.*, p. 1, para. 5). In the Forest Service's experience, in most cases the flow rates were reduced or the claims were withdrawn when challenged by the United States. For example, in Basin 76D 24 claims aggregating 261.32 cubic feet per second (c.f.s.) were reduced to three rights totalling 1.70 c.f.s., and in Basin 76M 60 claims amounting to 442.26 c.f.s. were reduced to 21 rights aggregating 57.16 c.f.s. as a result of the United States' objection. Had the United States not objected to these claims they would have probably been decreed. (*Id.*, p. 1, para. 6).

The affidavit of Arne E. Rosquist, Forest Hydrologist for the Lolo National Forest, states that based on Mr. Rosquist's experience in reviewing the temporary preliminary decrees for Basins 76E, M and N, the Forest Service has objected to water claims on basically three grounds: (1) gross errors in the legal description of either the point of diversion or the place of use; (2) excessive claimed volumes or flow rates; and (3) claims for non-existent uses. (Exhibit L, para. 1.)

The affidavit of James Wardensky, a Forest Service hydrologic technician assigned to the Kootenai National Forest, recites that, based on Mr. Wardensky's experience in attempting to verify water claims in Basin 76D (Kootenai River), the following discrepancies were often present in claims: legal descriptions of point of diversion, place of use or both were inaccurate; water transmission

lines and ditches were non-existent and had not been used in some time; amounts of water to be used for mining purposes were based on old county water appropriation records and were greater than actual uses; and some claimed mining uses were non-existent. (Exhibit G, p. 2, para. 1-4.)

The affidavit of Larry Meshew, formerly a Forest Service hydrologist assigned to the Kootenai National Forest, declares that in the temporary preliminary decree for Basin 76D, there is a total of 190 c.f.s. and 46,000 annual acre-feet (a.a.f.) claimed by various parties from Therriault Creek for irrigation uses in the April 1 to October 4 time period. However, Mr. Meshew calculated that there was an annual water yield from the watershed of Therriault Creek of only 11,000 a.a.f., *i.e.*, less than a fourth of the water claimed. Even Mr. Meshew's most liberal calculation of watershed water yield amounted to only 31,000 a.a.f. (Exhibit M, para. 4). The channel stability and fishery of Therriault Creek indicate that the claimed amounts have never been diverted. (*Id.*, para. 5.)

The situations outlined in the foregoing affidavits by federal personnel involved in the adjudication are not the only examples of excessive and inaccurate water claims, nor is the problem of inflated claims restricted to the basins noted above. The Forest Service and other federal agencies [have] only been able to investigate a fraction of the claims filed to date. Most claims, if they are to be examined, must be examined by DNRC.

2. *Basins in which no decrees have issued.* – DNRC, in a letter to Judge Lessley dated July 29, 1987 (Exhibit E), stated that it believes that all basins or sub-basins which

were verified using the old procedures and in which no temporary preliminary or preliminary decree had issued should be reverified using the new claims examination rules. In an order dated August 6, 1987 (Exhibit N), the Water Court stated the Court would decide whether there was a need for re-examination, either partially or wholly, in such non-decreed basins. The Water Court identified five basins which fit this description: Basins 40K (Whitewater River), 43A (Shields River), 40C (Lower Musselshell), 41G (Jefferson River), and 41C (Ruby River). (Order, p. 3.) The Court gave DNRC permission to file within 30 days of the date of the order a "Motion for Order to Re-examine" in any of these five basins (Order, p. 3). By letter to Judge Lessley dated August 14, 1987, DNRC declined to submit such a motion. (Exhibit O, Letter from Gary Fritz, p. 1.) Finally, on September 4, 1987 (Exhibit P), DNRC submitted reports for the five basins which, as a practical matter, constituted "comparison reports" as contemplated by the Stipulation (although, unlike the comparison reports which were the subject of para. 30 of the Stipulation, these five reports deal with *undecreed* basins).

The five comparison reports conclude in effect that the application of the new claims examination rules to these basins which have already been verified using the old verification manual would result in more accurate, defensible decrees of water rights. The reports disclose that the use of the new claims examination procedures may have a major impact on the information provided to the Water Court regarding a number of critical subject areas, including claimant contact, field investigations, amendments to claims, point of diversion, means of

diversion, reservoirs, type of irrigation system, place of use, volume, flow rate, and purpose of some uses. (See Exhibit Q, Comparison Reports, Table 1.) According to the reports, over one-half of the new procedures are "significantly different" from the old procedures.

The report for Basin 40C (Musselshell River below Roundup Drainage) is typical. There, the DNRC reports that "the consistency and accuracy of the decree should be improved using the new procedures." (Exhibit Q, Basin 40C Report, p. 2.) Among other specifics, the report notes that the Department's ability to gather information from claimants has been "greatly expanded" under the new rules, and the new rules provide for more detailed information to be communicated to the Water Court (*id.*, pp. 2-3). Significantly, DNRC states that application of the new rules would uncover "issues" involving claimed water rights (presumably including instances of inaccurate and excessive claims) which to date have not been revealed under past verification procedures. (*Id.*, p. 3.)

By order filed on October 19, 1987 (Exhibit R) the Water Court decided that "there is no apparent necessity sufficient to justify the costs of re-examining" Basin 40C. To our knowledge the Court has not yet ruled on the need for reverification of the other four undecreed basins (i.e., 40K, 43A, 41G, and 41C) for which comparison reports were produced.

III. ARGUMENT

Below, we demonstrate that the relief requested in the motion is required under both federal and state law. Under the standards of the McCarran Amendment, 43

U.S.C. 666, Montana is required to provide an adequate adjudication of water rights, including rights based on federal and state law. Unless the relief requested in the motion is granted, this adjudication will be inadequate under the McCarran statute. Furthermore, under principles of state law, the DNRC's role is essentially that of an expert witness whose expertise is critical to the achievement of accurate water right decrees which comport with the McCarran Amendment and due process. Unless the relief sought in the United States' motion is provided, DNRC will not be able to fulfill its role as expert in a professionally adequate manner, thus endangering the integrity of the entire adjudication. Finally, pursuant to the Stipulation, the Water Court should permit the DNRC to issue comparison reports for basins already under temporary preliminary or preliminary decree.

A. *The McCarran Amendment Requires Adequate Verification of Claims in All Basins.* – As discussed below, the statute which enables the adjudication of federal and Indian reserved rights to proceed in state court – the McCarran Amendment, 43 U.S.C. 666 – envisions a determination of these rights which meets a certain standard of procedural adequacy. In the Montana Water Court adjudication, much if not all of the verification of water claims conducted to date has fallen short of satisfying this standard, thus calling into question the statutory basis for joining the United States in this proceeding.

1. *The decisional law interpreting the McCarran Amendment demonstrates the requirement of adequate claims examination procedures.* – The McCarran Amendment waives the sovereign immunity of the United States from joinder in a suit "for the adjudication of rights to the use

of water of a river system or other source * * * " where the United States claims water rights and is a necessary party to such suit. 43 U.S.C. 666 (a). The McCarran statute, as any Act which consents to suit against the United States, must be strictly construed in favor of the United States. *Library of Congress* v. *Shaw*, 106 S. Ct. 2957 (1986), citing *McMahon* v. *United States*, 342 U.S. 25, 27 (1951).

Since 1952, when the statute was enacted, the courts have described the scope and limitations of the waiver of sovereign immunity afforded by the Amendment. One important condition to the consent to suit is the requirement that the adjudication scheme be "adequate" to determine federal and Indian reserved rights, as well as other rights at stake in the proceedings. The United States Supreme Court has decided that, as a general proposition, state courts may be adequate forums for adjudicating federal and Indian reserved rights. In support of this conclusion, the Court has stated that state courts have access to special expertise in adjudicating water rights. It follows, then, that if the expert water agency of the state is willing to perform its function in the adjudication, but is prevented from doing so by the Water Court, the jurisdictional basis for joining the United States in this adjudication may be defeated.

In *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800 (1976), the United States Supreme Court ruled that the McCarran Amendment's waiver of sovereign immunity included consent to determine in state court reserved water rights held on behalf of Indians. The single most important consideration which led the Court to this conclusion was the "clear federal policy" of avoiding "piecemeal litigation." *Colorado River*,

supra, 424 U.S. at 819. The Court stated that, as a general matter, Indian interests may be satisfactorily protected under regimes of state law. *Id.* at 812. However, in the course of permitting Indian reserved rights to be determined in Colorado's general stream adjudication, the Court explicitly left open the possibility that state court jurisdiction might be defeated "if the state proceeding were in some respect inadequate to resolve the federal claims." *Id.* at 820.[3]

In *Arizona* v. *San Carlos Apache Tribe*, 463 U.S. 545 (1983), the Supreme Court, extending the rationale of *Colorado River*, decided that the federal district courts in Arizona and Montana were correct in deferring to state court adjudications of federal and Indian reserved rights. This decision was based on the assumption "that the state adjudications are adequate to quantify the rights at issue in the federal suits," and also relied on the policies behind the McCarran Amendment, "the expertise and administrative machinery available to the state courts," the infancy of the federal suits, the judicial bias against piecemeal adjudication and the convenience to the parties. *San Carlos*, *supra*, 463 U.S. at 570. Elsewhere in the opinion, in the course of rejecting arguments by the United States and the Indians, the Court attached significance to "the specialized resources and experience of the state courts." *Id.* at 569.

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[3] See also *United States v. District Court for Eagle County*, 401 U.S. 520 (1971), and *United States v. District Court for Water Division No. 5*, 401 U.S. 527 (1971), holding that federal non-Indian reserved rights are subject to general adjudication in state proceedings under 43 U.S.C. 666.

In the now famous "Footnote 20," the *San Carlos* Court noted that there remained in the cases before the Court challenges "to the jurisdiction or adequacy of the [Arizona and Montana] proceeding[s] * * * to adjudicate some or all of the rights asserted in the federal suit[s]." The Court pointedly noted that the federal courts in those two states "should, if the need arises, allow whatever amendment of pleadings not prejudicial to other parties may be necessary to preserve in federal court those issues as to which the state forum lacks jurisdiction or is inadequate." *Id.* at 570 n. 20.[4]

In the wake of the *San Carlos* decision, both the Montana and Arizona Supreme Courts have had occasion to consider some of the issues raised by the United States Supreme Court's opinion in that case. In *State of Montana ex rel. Mike Greely* v. *Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 712 P.2d 754, 758, 762-768 (1985), the Montana Supreme Court held that the Montana Water Use Act under which this adjudication is being conducted is "adequate on its face" to determine Indian and federal reserved water rights, although upon a proper factual record the Act as applied might be found to be inadequate in the future.[5]

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[4] *San Carlos* also instructed the lower federal courts that resort to the United States district courts in Arizona and Montana should remain available "if warranted by a significant change of circumstances, such as, for example, a decision by a state court that it does not have jurisdiction over some or all of these claims after all." *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 571 n. 21 (1983).

[5] In *United States v. Superior Court, Maricopa County*, 697 P.2d 658 (1985), the Arizona Supreme Court sustained the state court general stream adjudication against challenges levelled by the United States and Indian tribes in the wake of the *San Carlos* decision.

In addition to the decisional law interpreting the requirements of the McCarran Amendment discussed above, the legislative history of the Amendment discloses that Congress envisioned joinder of the United States in proceedings in which water would be apportioned in an "honest [and] fair" manner. See, *e.g.*; S. Rep. No. 755, 82d Cong., 1st Sess. 5 (1951). An adjudication in which inaccurate claims cannot be effectively investigated by the DNRC – despite its desire to do so – hardly comports with this standard. This adjudication is not "honest and fair" to all of the parties thereto, because of the lack of due process which results from placing the burden on every party of examining all other claims to rebut the claims' *prima facie* validity. See M.C.A. § 85-2-227.

Thus, it appears from the foregoing that if the Montana water adjudication, as actually conducted, is inadequate in its utilization of the expertise and administrative machinery of the DNRC, the limited waiver of sovereign immunity effected by 43 U.S.C. 666 does not authorize the joinder of the United States in the adjudication. Below, we demonstrate that the inadequate verification of claims under the old verification manual is a serious problem, as recognized by the expert water resources agency of the State. (See Exhibit Q.)

2. *In the absence of reverification, the claims examination process conducted by DNRC will be inadequate under the standards of the McCarran Amendment.* – There are compelling indications that much of the verification of claims

conducted by DNRC under the former claims examination manual is not sufficient to provide the Water Court with the information and assistance which the Department is charged with providing under M.C.A. § 85-2-243. That section directs the DNRC, subject to the direction of the water judge, to provide information and assistance required by the water judge to adjudicate claims of existing rights, conduct field investigations of claims which the water judge in consultation with the department determines warrant investigation, and provide the water judge with all information in its possession bearing upon existing rights. Inadequate claims examination by the DNRC has occurred in both decreed and undecreed basins.

a. *There is a factual basis for concluding that at least some decreed basins have not been adequately verified.* – As set forth in the Statement, *supra*, at II. B., there are strong indications that the filing of excessive and otherwise inaccurate water claims has been pervasive in this adjudication. The affidavits of federal personnel summarized in the Statement show that many claimants have claimed water without regard to beneficial use, to the point that, in at least one case, claims from a water source (Therriault Creek) exceeded available water by over 400%. The existence of large numbers of erroneous claims in numerous basins, in and of itself, is sufficient reason for DNRC to conduct thorough and comprehensive claims examinations as a general rule in this adjudication. In addition to the data demonstrating the filing of many inflated claims, there are indications that at least some of the decreed basins have not been adequately verified by DNRC under the old verification manual, and that re-

examination of claims filed in these basins, using the new verification rules, would substantially improve the quality of DNRC's claims examination and lead to the entry of soundly-based decrees.

(1) *Data from federal agencies demonstrates the need for re-examination of claims in at least some decreed basins.* – Data compiled by USBR and BIA demonstrates that DNRC's verification of claims in Basin 41H would be significantly improved under new claims examination rules. The USBR study concludes that DNRC verified 38% of all irrigation claims in the basin with a single source (such as aerial photography) to substantiate the number of acres actually irrigated. (Exhibit I, p. 1, para. 2.) See also Exhibit J, BIA analysis, p.4, indicating that 32.8% of the claims reviewed by BIA were verified by DNRC using a single data source.) Under the new verification procedures, all irrigation claims would be verified employing two or more sources when available to check the acreage claimed. See Water Right Claims Examination Rules, Rule 2. VIII. (2). The USBR analysis states that reverification of Basin 41H would likely result in more information concerning claims, more resolution of claims before formal hearings, and a reduction in pretrial conferences previously required to determine issues related to objections. (Exhibit I, p. 1, para. 3.)

Based on their experience in investigating claimed rights, Forest Service personnel state that improved DNRC claims examination procedures would improve the accuracy of decreed rights. (Exhibit L, Rosquist affidavit, para. 2; Exhibit K, Russell affidavit, para. 9.) It should be emphasized that the Forest Service (or any other federal agency) is in no position to insure that all

suspect claims in this adjudication will be adequately verified. The Forest Service has only been able to investigate claims which might directly affect the National Forests, leaving many claims to be examined by DNRC or other parties. (Exhibit K, Russell affidavit, para. 9; Exhibit G, Wardensky affidavit, p. 2, last para.) Thus, large areas of most of the basins under temporary preliminary decree have not been subjected to the same level of scrutiny by the Forest Service which has resulted in the identification, reduction, and elimination of exaggerated or non-existent water claims Exhibit K, Russell affidavit, para. 8).

(2) *The Hydrometrics study indicates the necessity of re-examination of claims in some basins.* – Another indication of the need for re-examination by DNRC under the new procedures is a report prepared by Hydrometrics, a consulting firm in Helena, Montana.[6] The Hydrometrics report finds that there are many inaccurate and inflated claims in the temporary preliminary decrees for Basins 76K and 76E, and that DNRC did not conduct sufficient claims examination to ferret out inaccurate and inflated water use claims in those basins.

For example, in Basins 76K and 76E, there were a total of 29 sprinkler irrigation claims with a priority date earlier than 1936. These claims are facially suspect, since 1936 is the earliest date at which rural electrification would have made sprinkler irrigation feasible (Exhibit S, Hydrometrics report, p. 5-4). There is no indication in the

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[6] The report was produced for the law firm representing the Washington Water Power Company in the adjudication. WWPC provided an "Executive Summary" of the report to the Montana Supreme Court in *In re DNRC*, 740 P.2d 1096 (1987).

old DNRC Claim Verification Manual or verification abstracts that DNRC examined sprinkler irrigation claims to determine if the claimed acreages could, at the time of the claimed priority date, have been flood irrigated out of the claimed points of diversion, or whether a new use resulted from irrigation of more land than was originally flood irrigated. (See Exhibit S, Executive Summary of Hydrometrics report, pp. vii, ix.)

The Hydrometrics study also discloses that in the two basins examined, DNRC has conducted an insufficient number of field investigations to verify the accuracy of water rights claims. Of the 61 claims reviewed in Basin 76E, only two claims appear to have been field investigated before issuance of the temporary preliminary decree (Exhibit S, p. ix). In early 1986 DNRC stated that of the 70,000 claims that had been decreed in the adjudication process, only 20 field investigations had been performed. The report concludes that the lack of adequate field investigation is a major deficiency in verification and in resolution of objections (*id.*).

According to the Hydrometrics report, inadequate claims examination procedures resulted in the inclusion of inaccurate claims in temporary preliminary decrees. For example, of the 109 irrigation claims in Basin 76E with diversions equal to or greater than 2.5 c.f.s., 61 claims (56%) were decreed flow rates which exceed the standard flow rate of 17 gallons per minute per acre (Exhibit S, p. viii). In the same basin, two separate standards for irrigation water volumes were used. The old Water Court volume standards (implemented on November 12, 1982) were used in verification for the temporary preliminary decree. The new standards (implemented

October 19, 1984) were used to resolve some objections. The new standards for flood irrigation systems allow from 64% to 100% more water use than the old standards. Of the 109 irrigation claims with claimed diversions of 2.5 c.f.s. or greater, 26 (24%) were decreed volumes that exceed the new Water Court volume standard of 8.5 acre-feet per acre for Climatic Area IV for flood irrigation (*id.*).

The Hydrometrics study concluded that shortcomings in the claims examination process, among other problems, have reduced the reliability of the adjudication process and resulted in decrees with a questionable technical and factual basis (Exhibit S, p. 6-1).

The foregoing demonstrates that in at least some decreed basins, verification conducted to date has been insufficient. It is probable that this situation exists in other decreed basins as well. The best manner of ascertaining whether reverification is required in decreed basins is to permit DNRC, pursuant to the Stipulation, to issue comparison reports with respect to those basins.

b. *The state's own expert water resources agency has determined that there is a need for reverification in at least five undecreed basins.* – DNRC, in the comparison reports issued for Basins 40K, 43A, 40C, 41G, and 41C, had concluded in effect that the application of the Montana Supreme Court's claims examination rules to these basins which have already been completely or partly verified using the old verification manual would result in more accurate and defensible decrees of water rights (see Statement, *supra*, II. B. 2.). Perhaps the most important disclosure in these reports is the Department's view that application of the new rules would reveal "issues"

regarding claimed water rights (presumably including instances of inaccurate and inflated claims) which to date have not been uncovered under past verification procedures (see Exhibit Q, p. 3). The DNRC reports on these basins, without more, are sufficient ground for requiring reverification in those basins under the Montana Supreme Court's new rules.[7]

c. *The objection and hearing process is no substitute for adequate claims examination by DNRC.* – The Chief Water Judge has rejected requests for reverification based upon his view that the DNRC's claims examination functions under M.C.A. § 85-2-252 should not be regarded as a substitute for the objection and hearing process which follows the Department's verification activities. (See Exhibit T, letter from Chief Water Judge to John R. Hill, dated April 3, 1986.) The United States does not maintain that the DNRC should supplant the adjudicatory function of the Water Court. However, DNRC has a vital role to perform in the adjudication under the Montana Water Use Act, apart from the Water Court's adjudicatory functions. The department's important function is clear from M.C.A. § 85-2-243, which directs DNRC to inform and

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[7] Of the five basins for which DNRC has issued comparison reports, the Water Court has denied reverification in one – Basin 40C. (Exhibit R, Order filed October 19, 1987.) Basin 40C is an anomaly because the water court approved extensive claimant contact by DNRC in that Basin. This claimant contact resulted in claimants amending their claims and thereby increasing the accuracy of the decree. However, despite this claimant contact, DNRC should re-examine the claims in this Basin, because the new claims examination rules allow DNRC to investigate new issues.

assist the Water Court, subject to the Court's direction, as well as from § 85-2-231(1)(b), which specifies that the preliminary decree shall be based on, *inter alia*, "the data submitted by the department."

The DNRC's role of noting claims which that agency suspects are inaccurate or excessive permits the objection and hearing phases to be meaningful for the United States and other objectors.[8] The claims examination function of the DNRC is especially critical in light of the statutory presumption that water claims are *prima facie* valid. See M.C.A. § 85-2-227.

The United States is the largest single water claimant in the Montana adjudication, with over 32,000 water claims filed to date. In addition, in order to protect our extensive water rights for federal and Indian reservations, we have filed over 4,300 objections to claims listed in temporary preliminary decrees. Given the scope of the United States' water interests in the state, and the volume of its objections, the United States cannot be reasonably expected to investigate every water claim which might infringe on federal or Indian rights. The sheer number of filed claims and the size of many water basins creates an unmanageable situation for nearly all water users. Without DNRC assistance most water users, who usually appear *pro se*, will not have the resources to make

[8] Under the old verification procedures, DNRC noted "grey area remarks" to flag claims concerning which the agency's investigation had raised questions. Under the new claims examination rules, DNRC is to prepare a "summary report" which will encapsulate the results of its inquiry. (See new Claims Examination Rule 1. VI., and Exhibit A to rules.)

informed objections in the adjudication. DNRC performs a vital role in signalling to water users which claims are suspect and possibly worth challenging. In addition, the expertise of that agency is critical in providing information to the Water Court for use in all phases of the adjudication.[9]

(1) *The United States must rely on DNRC to a significant extent in the United States' efforts to protect its water interests in the adjudication.* – As a practical matter, the United States must rely to some extent on the claims examination functions of DNRC when the United States reviews temporary preliminary decrees to decide to which claims to object, and when the federal government attempts to resolve the objections.

For example, the Bureau of Reclamation has filed approximately 640 objections to claims in 12 basins which have reached the temporary preliminary or preliminary decree stage. Over 95% of those USBR objections were based on "grey area remarks" placed on inaccurate or unsubstantiated claims by DNRC as part of its verification process (Exhibit U, Pike affidavit, para. 2; Exhibit I, Pike affidavit, para. 2).

In addition, in USBR's experience, DNRC filed objections against most of the questionable or inaccurate

[9] By its position herein, the United States does not mean to suggest that DNRC's claims examination procedures should be applied to the water rights claims of the United States on behalf of federal and Indian reservations. (See Stipulation, para. 45, p. 18, which recites that the verification procedures resulting from the Stipulation are not intended to be applied to the reserved rights claims for Indian and other federal reservations.)

claims once those claims were included in the temporary preliminary decrees. USBR relied heavily upon DNRC participation in the adjudication process in resolving Bureau objections. Of the USBR objections for which hearings have been held, about 90% have been resolved through the claimants contacting DNRC to clarify or correct aspects of their claims which precipitated the grey area remarks, often resulting in significant changes to rights as decreed in the temporary preliminary decrees. (Exhibit U, para. 3.) USBR is not capable of performing claims examination functions which DNRC may not be able to provide in the future due to recent reductions in DNRC's budget (*id.*, para. 4).

BIA also relies on DNRC to a considerable extent in deciding which claims should be objected to and in pursuing objections. To date, BIA has filed 134 objections in Basin 41K (Sun River) and 701 objections in Basin 41H (Gallatin River). Due to time and personnel limitations, BIA filed its objections based primarily on verification information developed by DNRC (Exhibit V, Oellermann affidavit, para. 2-3.) If hearings are set on the BIA objections, BIA will not have the personnel to perform field investigations which may be needed, thus necessitating reliance on field checks by DNRC (*id.*, para. 4).

The fact that the Forest Service has successfully investigated and challenged numerous claims in the adjudication (as described in the Statement, *supra*, at II. B. 1. b. (2)) does not detract from the position asserted herein that to a considerable degree the United States must depend on the claims examination function of the DNRC. No party to the adjudication, including the United States, should be required to fulfill the DNRC's verification

duties as set out in the Montana Water Use Act. See M.C.A. §§ 85-2-243, 85-2-231 (1) (b).

In addition, the results achieved by the Forest Service have come at considerable cost in money and time. Over 200 Forest Service employees have been involved in reviewing temporary preliminary decrees, investigating claims and providing evidence since the first temporary preliminary decree was issued. (Exhibit K, Russell affidavit, para. 7.) This effort has cost the federal government in excess of one million dollars in direct cost (some of which is attributable to the Forest Service's own claims), not including management overhead (*id.*). This cost to the United States runs afoul of the intent of Congress in the McCarran Amendment that the United States should not shoulder a disproportionate portion of the costs of a general stream adjudication. See 43 U.S.C. 666(a), providing that "no judgment for costs shall be entered against the United States" in a proceeding under the statute.

No party to this adjudication besides the DNRC can provide the comprehensive and thorough claims examination which is required to render the adjudication adequate. As the Forest Service's Regional Hydrologist states, based on that agency's experience to date, it appears that in the absence of more effective and comprehensive DNRC verification procedures, numerous exaggerated or non-existent water rights will be finally decreed in the 46 additional basins involving Forest Service interests which remain to be adjudicated. This will be the case even if Forest Service participation remains at the present level. (Exhibit K, Russell affidavit, para. 9.)

Another reason that the Forest Service participation does not undermine our position that the DNRC's role is critical to the adequacy of the adjudication is that the other federal agencies with water interests in Montana (such as BIA, USBR, and the Fish and Wildlife Service) lack the resources of the Forest Service to document objections to claims. (Exhibit U, Pike affidavit; Exhibit V, Oellermann affidavit, para. 3-4.)

d. *Reductions in DNRC's budget may not excuse an inadequate adjudication.* – In support of limiting DNRC's claims examination activities in these proceedings, the Water Court has cited the recent cuts in DNRC's budget which restrict the agency's ability to verify claims. (See Exhibit N, Order dated August 6, 1987, pp. 2-3; Exhibit R, Order filed October 19, 1987, p. 7; see also Exhibit A, Montana Supreme Court Order Adopting Water Right Claim Examination Rules, p. 3.) These budgetary restrictions cannot justify an inadequate claims examination process. Under the "adequacy" standards of the McCarran Amendment, one arm of the state (the judiciary) may not excuse an inadequate adjudication by pointing to the failure of another arm (the legislature) to appropriate funds.[10] If Montana's adjudication falls short of the standard required by the United States Supreme Court,

[10] The conclusion stated in the text is especially true given that the Chief Water Judge, in a letter to Senator Peter R. Story dated February 18, 1987, opposed DNRC's attempts to resist the reduction in funding for DNRC's assistance to the Water Court (Exhibit W). The letter states that "[i]f the DNRC is not willing to work under the direction of the Water Court, then perhaps closing the purse strings is the only way to control the agency" (Exhibit W, p.3).

the United States should not be subject to the proceedings.

The recent cuts in the DNRC's budget threaten to place even more of the burden of identifying erroneous claims on federal agencies and other parties to the adjudication who are in no position to carry out this function. DNRC had announced that due to fiscal restrictions it is withdrawing approximately 85% of the objections to water right claims it has filed in the past several years. (Exhibit X, letter from Larry Fasbender to Judge Lessley dated July 7, 1987.) This partial removal of DNRC from the objection and hearing process will be detrimental to federal agencies' efforts to protect their water interests. (See, *e.g.*, Exhibit U, Pike affidavit, para. 4.)

The foregoing demonstrates that the adequacy standard of the McCarran Amendment requires the relief the United States seeks in the motion. Below, we demonstrate that state law supports the United States' motion as well.

B. *The DNRC in its Role as Expert Witness Should Be Permitted to Conduct Adequate Claims Examination.* – DNRC's role in this adjudication is akin to that of an expert witness. As the Montana Supreme Court has noted, under M.C.A. § 85-2-243, DNRC is to conduct field investigations and provide other information respecting water claims at the Water Court's request. In re DNRC, *supra*, 740 P.2d at 1101; Exhibit A, Order Adopting Water Right Claim Examination Rules, pp. 2-3. However, this does not mean that the Water Court may direct the

agency in the formulation of its expert conclusions concerning the verification of water claims.[11] As the Montana Supreme Court stated, DNRC has a "crucial role to be played * * * in the adjudication of water rights claims:"

> The technical expertise, assistance and information of the DNRC, which all sides recognize, is indispensable for the success of the adjudication process. A lack of departmental cooperation in the furnishing of such technical expertise, assistance or information could bring the judicial adjudication of water rights to a grinding halt.

In re DNRC, supra, 740 P.2d at 1102. This role of DNRC's is closely analogous to that of an expert witness pursuant to Montana Rules of Evidence 702-705. The value of DNRC's role as an expert is seriously compromised if the department is not permitted to conduct its investigations in a manner which it regards as professionally acceptable.

Indeed, the admissibility of DNRC's information is called into question if that data is, by the department's own admission, not based upon adequate verification, including field investigation if needed. See, *e.g., State Highway Commission v. Antonioli,* 145 Mont. 411, 401 P.2d 563 (1965) (expert testimony regarding value of mining claim inadmissible for lack of foundation, where there were no core drilling, surface or subsurface sampling, geological reconnaissance and other studies); *State Highway Commission v. Palin,* 160 Mont. 486, 503 P.2d 524

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[11] Compare Water Right Claims Examination Rules, Rule 1. I. (2), which provides in part: "The water court determines the necessity and scope of any preliminary Department examination as set out in these rules, but in no way influences the results of the directed examination."

(1972) (expert testimony on value of grazing land inadmissible, where witness' assumption as to carrying capacity of land was not based on any actual information concerning amount of income which could have been derived from the land).

It may be prejudicial error to permit an expert to testify concerning a matter on which the witness states he has inadequate information. *Cf. State Highway Commission v. Metcalf,* 160 Mont. 164, 500 P.2d 951 (1972) (error to permit witness to express opinion on value of gypsum deposit, where witness stated he was unable to testify as to fair market value of deposit). A trial court's improper restriction of expert testimony may also constitute reversible error. See, *e.g., Hunsaker v. Bozeman Deaconess Foundation,* 179 Mont. 305, 588 P.2d 493 (1978).

In these proceedings, in order for DNRC to perform its expert claims examination functions in a professionally adequate manner, the agency should be permitted to issue comparison reports on decreed basins and to reverify claims in basins which, on the basis of comparison reports, require re-examination.[12]

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[12] It is instructive to compare DNRC's operations in the Montana water proceedings to the investigatory activities of the Arizona Department of Water Resources (DWR) in the Gila River drainage adjudication. In *United States v. Superior Court, County of Maricopa,* 697 P.2d 658 (1985), the Arizona Supreme Court held that DWR's role in the proceedings did not violate standards of procedural due process.

The functions of DWR in the adjudication are set out in A.R.S. §§ 45-253, 45-255, 45-256. The DWR assists the proceedings by, among other actions, helping to determine the geographical scope of the adjudication, and providing the court or

C. *The Stipulation Requires DNRC to Prepare Comparison Reports for Previously Decreed Basins.* – As noted in the Statement, *supra*, at II. A., the United States and other parties to this adjudication entered into an agreement with the Water Court which was designed to address, among other issues, verification problems which had arisen under the old verification manual. The Stipulation specifically addressed the matter of decreed basins which had been verified under the old procedures, by providing in para. 30 that the DNRC was to produce reports comparing the effects of applying the old verification procedures with the effects of using the "verification procedures adopted pursuant to this Stipulation." On the basis of these comparison reports, DNRC or other interested persons could then move the Water Court to order DNRC to apply the new procedures to any such basin.

Thus, the comparison report process is a key step in permitting parties such as the United States to learn if

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master with "technical assistance" on subjects "with respect to which the [DWR] possesses hydrological or other expertise." A.R.S. § 45-256(A). "Technical assistance" includes identifying hydrological boundaries and potential claimants, locating and obtaining records, conducting a "general investigation" or examination of the river system and source, investigating and examining facts pertaining to claims, preparing maps and plats, gathering such other information "as may be necessary or desirable," and reporting to the court or master. Under A.R.S. § 45-256(B), the technical assistance rendered by DWR is to be set forth "on a claim by claim basis." See *Maricopa County, supra*, 697 P.2d at 672. The Arizona statute recognizes that the parties to a comprehensive general water adjudication cannot be expected to perform the expert function of the state's water resources agency.

there is a need for re-examination in a decreed basin, and in obtaining reverification if necessary. Under para. 47 of the Stipulation, the United States reserved the right "to take appropriate legal action to enforce the terms of this Stipulation or to ensure that accurate and legally defensible decrees will be issued." Pursuant to para. 47, the United States has moved for enforcement of the comparison report provisions of the Stipulation.

Although the Stipulation was not formally entered by the Montana Supreme Court as a consent decree, it was agreed to by the parties as a condition to dismissal of the petitions under Montana R. App. Civ. P. 36. For this reason, the Stipulation should be enforced under principles of contract law. In consideration for the United States and DFWP agreeing to move to dismiss their petitions regarding procedural issues, the Water Court agreed to certain procedural revisions, including the comparison report process of para. 30. (See Stipulation, pp. 1-3, 17-19.) Thus, there were mutual promises made which constitute valid consideration under Montana law. *Rudio v. Yellowstone Merchandising Corp.*, 652 P.2d 1163 (1982); *Miller v. Titeca*, 628 P.2d 670 (1981). The United States fulfilled its side of the bargain by moving on March 20, 1986, to dismiss its petition for a writ of supervisory control on the basis of the agreement. Thus, the Water Court should comply with comparison report procedure set forth in the agreement. *Smith v. Zepp*, 173 Mont. 358, 567 P.2d 923 (1977) (where party to contract obligates himself to legal and possible performance, he must perform in accordance with contract terms).

The Stipulation is presently in effect and binds the Water Court, at least with respect to those parts of the

agreement which do not violate the Montana Water Use Act. Although the Water Court may take the view that there was no "meeting of the minds" respecting some of the agreement's particulars, the fact remains that the Water Court accepted the procedures outlined in the Stipulation, without exception (Stipulation, para. 3, p. 3),[13] and signed the agreement. One who executes a written contract is presumed to know the contents of the contract and assent to its specified terms, in the absence of fraud, misrepresentation, or other wrongful act by other contracting parties. *Quinn v. Briggs*, 172 Mont. 468, 565 P.2d 297 (1977). See also *Ryan v. Ald, Inc.*, 143 Mont. 367, 427 P.2d 53 (1967). If reasonably practicable, every part of a contract must be given effect so as to make its terms operative. *Bender v. Rookhuizen*, 685 P.2d 343 (1984); *Lewis v. Murphy*, 649 P.2d 740 (1982); *Guidici v. Minerals Engineering Co.*, 136 Mont. 389, 348 P.2d 354 (1960).

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[13] Paragraph 3 of the Stipulation reads:

> The purpose of this Stipulation is to expeditiously resolve the differences between the parties while conserving the resources of the parties and the Montana Supreme Court. The issues raised in the petitions filed by [DFWP], Esther McDonald, *et al.*, and the United States of America have been divided into substantive and procedural issues. The parties and amici have recommended a process for resolving the substantive legal questions in the most expeditious manner possible. *Where procedural issues are involved, the parties and amici have recommended changes in Water Court procedures and policies that constitute a settlement of the procedural matters in dispute or have recommended a process for resolving the procedural issues. The Water Court has accepted the recomendations.* [Emphasis supplied.]

The Montana Supreme Court has, at least on one occasion, recognized that the Stipulation is effective even though it has never been formally "accepted" by that Court. In *In re DNRC, supra*, 740 P.2d at 1104, the Montana Supreme Court, relying on the Stipulation, rejected DNRC's contention that the Water Court was engaging in an improper incursion by the judiciary on the executive powers of the department.

Specifically, the Court adverted to para. 26 of the agreement, which sets out a framework for cooperation between the Water Court and DNRC on the subject of verification, and which specifically provides that "[t]he water court shall refrain from participating in the verification of claims by DNRC, except the water court, upon proper application and for good cause shown, may enjoin DNRC from acting beyond its jurisdiction in the verification process." *In re DNRC, supra*, 740 P.2d at 1104. The Montana Supreme Court concluded that "[t]he language of the foregoing stipulation, acceded to by the chief judge of the water court, belies any intention of the water court to override or control the day to day operations of the DNRC." *Id.* Thus, even though the Supreme Court has not expressly approved the Stipulation, it obviously regards it as in effect for at least some purposes.

The arguments against the effectiveness of the comparison report provisions of the Stipulation are not persuasive. In its Order Adopting Water Right Claim Examination Rules of July 7, 1987, the Montana Supreme Court may have cast some doubt on the binding nature of the Stipulation when it stated that "[t]he statutory power of the water judges to direct the process of adjudication [under M.C.A. § 85-2-243] should not and cannot be

stipulated away." (See Exhibit A, Order, p. 3.) This statement does not contradict the United States' position that the Water Court should comply with the comparison report provisions of the Stipulation, chiefly para. 30. In para. 30, the Water Court *exercised* its statutory power to direct the adjudication by agreeing to a framework for comparing the application of the old verification rules with the new procedures in decreed basins. Having made this commitment, the Water Court is bound. To hold otherwise would render the Stipulation a futile gesture.

It might be contended that the new claims examination rules were not "adopted pursuant to [the] Stipulation,"[14] and therefore the provisions of the Stipulation dealing with comparison reports do not apply to those rules. However, this argument overlooks the fact that the claims examination rules ultimately adopted by the Supreme Court originated with the procedures drafted by the DNRC pursuant to the Stipulation. In fact, the Montana Supreme Court in its order promulgating the new rules remarked that it was adopting "practically without amendment or deletion" the rules suggested by DNRC for the department's processing of water claims. (Exhibit A, Order, pp. 3-4.) Therefore, the new claims examination rules should be deemed to have been adopted pursuant to the Stipulation for purposes of effectuating the intent of para. 30 of the agreement. An agreement should be interpreted such that the intentions of the parties are

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[14] Paragraph 30 of the Stipulation recites that DNRC shall file reports with the Water Court "comparing the previous verification procedures *with the verification procedures adopted pursuant to this Stipulation.*" (Emphasis added.)

given effect and such that the contract will be lawful, operative and definite. *Foster v. Realty Title Co.*, Inc., 680 P.2d 323 (1984); *Downs v. Smuk*, 185 Mont. 16, 604 P.2d 307 (1979); *Rumph v. Dale Edwards, Inc.*, 183 Mont. 359, 600 P.2d 163 (1979).

The foregoing shows that the comparison report provisions of the Stipulation are in effect and should therefore be followed by the Water Court. At a minimum, the Water Court has a moral obligation to act in a manner consistent with that part of the agreement. If the Water Court believes that those provisions are a dead letter, the United States requests that the Court enter a ruling to this effect in order that the United States and other affected parties may pursue whatever remedies are available to them.[15] Otherwise, the parties and the Water Court will continue to wallow in uncertainty concerning what guidance, if any, the Stipulation affords to the parties in contending with the complex issues raised by this adjudication.

IV. CONCLUSION

Both the McCarran Amendment and state law support the request for relief in the United States' motion. There are compelling indications that, in at least some

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[15] Since the petitions for writs of supervisory control are still pending before the Montana Supreme Court, one remedy open to the United States is to reopen the proceedings in that Court in the United States' action (No. 85-493) and obtain a decision from that Court regarding such questions as the effectiveness of the Stipulation and the other issues raised in this brief.

basins which have been partially or completely verified using the old verification manual, there is a real need for reverification using the new claims examination rules.

We recognize that the new claims examination rules themselves may be changed in significant respects in the near future. The Montana Supreme Court, in issuing the new rules, declared that their adoption shall be deemed temporary until the further order of that Court, but shall govern from July 15, 1987, the practice and procedure respecting water claims examinations before the Water Court and DNRC, unless otherwise amended or modified by the Supreme Court. (Exhibit A, Order, p. 5.) The Supreme Court gave interested parties until March 15, 1988, in which to comment respecting the operation or effectiveness of the new rules.

The United States may comment critically on some aspects of the new rules by the March 15, 1988 deadline. Therefore, the United States' request for reverification under the new rules is not intended as a blanket endorsement of those procedures.[16] However, we believe that the new claims examination procedures are in general more likely to result inadequate decrees than the old rules were. For this reason, we have made our motion. In light of the fact that the new rules may be substantially modified in the near future, the Water Court may wish to consider delaying reverification under the new procedures until they have become finalized.

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[16] Nor should the United States be understood, through this motion and brief, to signal its approval of the Water Court practice of routinely issuing temporary preliminary decrees.

For the reasons set forth above, the United States requests that:

1. The Water Court order the DNRC to issue comparison reports for basins which are covered by temporary preliminary decrees or preliminary decrees, in accordance with para. 30 of the Stipulation. In order for the comparison reports to be useful to interested parties, the Water Court or DNRC should give all interested parties adequate notice of the availability of the reports.

2. The Water Court order DNRC to reverify, using the new claims examination rules, those basins in which, according to DNRC reports, the application of the new rules would result in more accurate decrees, specifically Basins 40K, 43A, 40C, 41G, and 41C.

DATED this 21st day of December, 1987.

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No. 92-190

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF IDAHO, EX REL. DIRECTOR,
IDAHO DEPARTMENT OF WATER RESOURCES

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF IDAHO

REPLY BRIEF FOR THE UNITED STATES

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The issue in this case is whether, when a State joins the United States in a water right adjudication suit pursuant to the McCarran Amendment, 43 U.S.C. 666, the State may refuse to recognize the United States' water right claims unless the United States pays "filing fees," which finance the State's costs in the adjudication. We argue in our opening brief that the United States is exempt from such filing fees—which are estimated to total more than $10 million in this litigation alone—because the McCarran Amendment does not contain a clear and unambiguous waiver of the United States' immunity from fee assessments. The McCarran Amendment's "joinder" and "pleading" provisions contain no consent to imposition of filing fees against the United States, U.S.

Br. 18-30, and the Amendment's "judgment" provision confirms that no such consent was intended, U.S. Br. 31-38. Idaho and the amici States fail to overcome those textual obstacles to imposing monetary assessments against the United States.

1. Idaho and the amici States dispute our submission that the McCarran Amendment—like other waivers of federal sovereign immunity—should be construed strictly in favor of the sovereign and not enlarged beyond what the language requires. Compare U.S. Br. 15-17, with Idaho Br. 14-18, and Amici States Br. 4-6. According to Idaho, the McCarran Amendment is a "'sweeping' waiver[] of sovereign immunity" and 'should therefore be construed by "pa[ying] special attention to the Congressional policy underlying the language of the Amendment." Idaho Br. 15; see also *id.* at 40-41; but see Idaho Br. in Opp. 12-14 (conceding that the waiver must be "clear and unambiguous"). The amici States similarly assert that "[w]hen a statute contains a broad waiver of sovereign immunity, the Court has neither looked solely to the statutory text to determine the scope of the waiver nor has it required that the scope of the waiver be stated unambiguously." Amici States Br. 4-5.

Idaho and the amici States are wrong at the outset in characterizing the McCarran Amendment as a "sweeping" or "broad" waiver of immunity. The Amendment is not written in "simple, sweeping language" (Idaho Br. 13); indeed, its lengthy text is phrased in carefully circumscribed terms. 43 U.S.C. 666. See U.S. Br. 2, 18; pp. 4-7, *infra*. This Court has never described the McCarran Amendment as a "sweeping" or "broad" waiver of immunity, and

the decisions Idaho cites provide no basis for that characterization. See Idaho Br. 14-17.[1]

In any event, Idaho's proposed approach is a stark departure from the established rules for construing waivers of sovereign immunity. This Court has articulated clear and uniformly applicable principles to govern construction of waivers. See, *e.g.*, *United States* v. *Nordic Village, Inc.*, 112 S. Ct. 1011, 1014-1015 (1992). In every case, a waiver of sovereign immunity must be strictly construed in favor of the sovereign and not enlarged beyond what the statutory language requires. *Ibid.* See, *e.g.*, *United States* v. *N.Y. Rayon Importing Co. (#2)*, 329 U.S. 654, 660 (1947); see also Idaho Br. in Opp. 12-14. This Court has never suggested that the McCarran Amendment is exempt from those principles. Nor has it suggested that the principles for construing sovereign immunity waivers vary, depending on whether the statute at issue manifests a "broad" or "narrow" waiver. See *Nordic Village*, 112 S. Ct. at 1014-1015.[2]

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[1] The statute this Court interpreted in *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986), which stated that "the United States shall be liable for costs the same as a private person" (42 U.S.C. 2000e-5(k)) provides an example of a waiver phrased in far more "simple, sweeping language" than the McCarran Amendment. The Court nevertheless applied its traditional principles for construing waivers of sovereign immunity to that statute, see 478 U.S. at 318, and held that it did not waive the United States' distinct immunity from a form of monetary liability—in that case, liability for interest, see *id.* at 318-323.

[2] Idaho attempts to distinguish the McCarran Amendment based on this Court's general observation that "water rights adjudication is a virtually unique type of proceeding, and the McCarran Amendment is a virtually unique federal statute." See Idaho Br. 15, quoting *Arizona* v. *San Carlos Apache Tribe*,

Idaho provides no reason for departing from established sovereign immunity principles in this case. The principles that this Court has articulated provide clear guidance to legislatures, the courts, and the public. In contrast, Idaho's novel two-tiered approach —which would require courts to make a preliminary, ad hoc determination whether a waiver is "broad" or "narrow," and then to apply different rules of construction depending on that preliminary characterization—would add needless doctrinal complexity and confound the inquiry. The obvious purpose of Idaho's cumbersome two-step process is to loosen existing sovereign immunity standards, so as to produce a waiver of sovereign immunity where one would not otherwise exist.[3]

2. The question squarely presented, then, is whether the McCarran Amendment clearly and unambiguously waives federal sovereign immunity from state fee assessments. See U.S. Br. 15-17. The answer on the face of the statute is no. None of the McCarran Amendment's three relevant provisions—the joinder, pleading, and judgment provisions—contains an explicit waiver of immunity from monetary liability in any form. Despite Idaho's invocation of

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463 U.S. 545, 571 (1983). But such statements do not insulate the McCarran Amendment from rules of construction that normally apply to waivers of sovereign immunity. Indeed, only last Term, the Court reaffirmed that "[*a*]*ny* such waiver must be strictly construed in favor of the United States." *Ardestani* v. *INS*, 112 S. Ct. 515, 520 (1991) (emphasis added).

[3] The Idaho Supreme Court did not use Idaho's analytical approach, Pet. App. 6a-8a, and Idaho has not referred to any other court that has done so. See Idaho Br. 14-18.

the "plain language" of the statute (Idaho Br. 18), the State necessarily bases its arguments on other sources.

a. Idaho begins by asserting that this Court has "treated" the McCarran Amendment like "the 'sue or be sued' clauses associated with federal governmental corporations." Idaho Br. 19; see *id.* at 20-22.[4] This Court, however, has never made such a comparison. The analogy is Idaho's alone, and it is not accurate. The McCarran Amendment, which applies to the United States *in toto* (not merely to those instrumentalities that resemble private corporations), bears no textual similarity to the standard "sue and be sued" clause. See note 4, *supra*. Moreover, Idaho's comparison simply begs the question. The fundamental inquiry remains whether the McCarran Amendment contains an unequivocal expression of consent to fee assessments.[5]

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[4] As this Court has explained, Congress employs a "sue and be sued" clause as a term of art to waive the sovereign immunity of a particular government instrumentality, so that the instrumentality will be "treated similarly to other self-sustaining commercial ventures." *Franchise Tax Board* v. *United States Postal Service*, 467 U.S. 512, 525 (1984). See, *e.g.*, 39 U.S.C. 401(1) ("The Postal Service shall have the following general powers: (1) to sue and be sued in its official name.").

[5] Indeed, the fact that the McCarran Amendment does *not* contain the language of a "sue and be sued" clause persuasively suggests that Congress intended a more limited waiver of immunity that does not encompass monetary liability of any sort, including assessment of fees. Compare *Loeffler* v. *Frank*, 486 U.S. 549, 553 (1988) (holding that the Postal Service's "sue and be sued" clause gave that agency the "status of a private commercial enterprise" and subjected it to prejudgment interest), with *Library of Congress* v. *Shaw*,

b. Idaho's attempt to confront the actual language of the McCarran Amendment is no more successful. As we explain in our opening brief, Idaho has already acknowledged that the McCarran Amendment's joinder provision—which consents to joinder of the United States as a defendant in suits for the comprehensive adjudication of water rights if it appears that the United States is the owner of or is in the process of acquiring water rights "by appropriation under State law, by purchase, by exchange, or otherwise" (43 U.S.C. 666(a))—does not suffice as a waiver of immunity from state filing fees. See Idaho Br. in Opp. 15. Thus, Idaho appropriately concedes that the waiver it urges must be derived from the provisions of the McCarran Amendment that follow. See Idaho Br. 18-19.[6]

Idaho acknowledges that the McCarran Amendment's pleading provision—which states that the

478 U.S. 310, 317 & n.5 (1986) (retaining the "traditional legal rule regarding the immunity of the United States from interest" with respect to other agencies that do not have "the status of a private commercial enterprise").

[6] Idaho claims that our opening brief "selectively edits" and "misquotes" the State with respect to its interpretation of the joinder provision. Idaho Br. 19 n.11. Our brief, however, simply repeats the point that Idaho has conceded: mere joinder of the United States, without more, would not subject the United States to "special adjudication requirements," such as a requirement that a defendant pay filing fees. Idaho Br. in Opp. 15. In Idaho's words:

> Further consent was needed from Congress, beyond simply joining the United States in such suits, to require the United States to comply with these special adjudication requirements.

Ibid. Idaho's brief on the merits does not disavow that concession.

United States shall be "deemed to have waived any right to plead that the State laws are inapplicable," 43 U.S.C. 666(a)—"is the only sentence in the McCarran Amendment which explicitly approves of application of *state* laws to the United States." Idaho Br. 19 n.11 (emphasis in original). Idaho construes the pleading provision to waive the United States' immunity from filing fees by simply assuming—without regard to the preceding provisions of the McCarran Amendment—that the pleading provision's reference to "the State laws" means all "state laws pursuant to which adjudications are conducted." Idaho Br. 19, 22-24. Idaho's assumption is unwarranted.

As we explained in our opening brief, Congress's use of the definite article "the" before "State laws" indicates that the term refers to a particular body of "State law." See U.S. Br. 24-25. The particular body of "State law" is the one identified in the immediately preceding sentence—the "State laws" governing "aqui[sition of] water rights by appropriation." 43 U.S.C. 666(a). There is nothing "convoluted" (Idaho Br. 22) in that conclusion. It is consistent with familiar rules of grammar and statutory construction. See U.S. Br. 26-27. Indeed, it is precisely the way the Court reads similarly phrased statutes. See *Work* v. *United States ex rel. McAlester-Edwards Co.*, 262 U.S. 200, 208 (1923); see also *Freytag* v. *Commissioner*, 111 S. Ct. 2631, 2651 (1991) (Scalia, J., concurring).[7]

[7] Idaho and its amici assert that the joinder provision's reference to "State law" and the pleading provision's reference to "the State laws" cannot refer to the same body of law, because the first reference "is in the singular and is used

c. Idaho and the amici States rely heavily on legislative history in attempting to overcome our straightforward reading of the McCarran Amendment's text. See Idaho Br. 24-27; Amici States Br. 11-16. This Court, however, has rejected similar attempts to employ legislative history as a substitute for an express waiver of sovereign immunity. As the Court explained in *Nordic Village*,

> the "unequivocal expression" of elimination of sovereign immunity that we insist upon is an expression in statutory text. If clarity does not exist there, it cannot be supplied by a committee report.

112 S. Ct. at 1016. Here, the text of the McCarran Amendment does not contain the requisite "separate waiver," *Library of Congress*, 478 U.S. at 314, of the United States' distinct immunity from monetary liability, especially for fees and costs associated with litigation. In any event, Idaho and the amici States fail to point to any "unequivocal expression" in the legislative history that the United States would be subject to state filing fees as a condition for adjudication of its water right claims.

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as a modifier of the term 'appropriation'" and the second "is plural" and "is used as a noun." Idaho Br. 23; Amici States Br. 7-8. Idaho does not explain why those supposed distinctions should make a difference. For example, this Court concluded in *Work* that Congress used the term "the appraisement" in one statute (Act of Feb. 8, 1918, ch. 12, § 4, 40 Stat. 433-434) to identify the valuation specified in a prior statute, which stated that certain lands were to be "appraised by three appraisers" (Act of Feb. 19, 1912, ch. 46, § 1, 37 Stat. 67-68). See 262 U.S. at 202-203 & n.1, 206-208. Similarly, Congress certainly could use the term "the State laws" to identify its prior reference to a particular body of "State law." 43 U.S.C. 666(a).

The legislative history does not specifically discuss the meaning of the pleading provision. Idaho and the amici States simply cite general statements noting the desirability of joining the United States in state water right proceedings to obtain a comprehensive adjudication of all claims to a common resource. See Idaho Br. 25-27; Amici States Br. 11-16. Those statements do not imply that the United States additionally must *finance* the State's water right proceedings. Idaho and the amici States also rely on the fact that the Senate Report quoted from this Court's decision in *Pacific Live Stock Co.* v. *Lewis*, 241 U.S. 440 (1916), which, among other things, rejected a due process challenge to Oregon's imposition of modest filing fees against private parties. See Idaho Br. 33-34; Amici States Br. 20-21. The Senate Report, however, did not mention the decision in reference to filing fees; rather it cited the case for the general proposition that general stream adjudications require participation by all water users. S. Rep. No. 755, 82d Cong., 1st Sess. 5 (1951).[8]

d. Idaho characterizes our interpretation of the McCarran Amendment's pleading provision as "nonsensical," stating that "an additional waiver to state appropriation laws in the context of a general stream adjudication is unnecessary." Idaho Br. 27-28. We disagree. The McCarran Amendment's text reflects careful attention to the familiar and established prin-

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[8] Similarly, there is no relevance to the Senate Report's mention that in "some States" private water users pay an annual fee "for the services of water commissioners" to enforce "decreed rights." S. Rep. No. 755, *supra*, at 5. The Senate Report made that passing observation in the course of noting that those commissioners make recommendations concerning the administration of *adjudicated* rights. *Ibid.*

ciple that the United States is not only generally immune from suit, but also is normally exempt from state regulatory requirements that infringe federal interests. In the absence of an express congressional waiver, that principle of federal supremacy would apply with full force to state laws governing the acquisition of water rights by appropriation, just as it applies to other state laws.[9]

The pleading provision of the McCarran Amendment balances federal supremacy rights against the States' interest in protecting settled expectations of other water users by preventing the United States from invoking its sovereign prerogatives in a water rights adjudication as a *defense* to an allegation that the United States has failed to comply with state law requirements in obtaining a state water right. In the precise words of the statute, "[t]he United States, *when a party to any such suit*, shall * * * be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty." 43 U.S.C. 666(a) (emphasis added).[10] Thus, our interpretation is not only consistent with the precise terms of the McCarran Amendment—which waives the United States' immunity from certain claims made in a lawsuit—but it also produces a sensible result.[11]

[9] See, *e.g.*, *Hancock* v. *Train*, 426 U.S. 167 (1976) (state pollution control permit for a federal facility); *Leslie Miller, Inc.* v. *Arkansas*, 352 U.S. 187 (1956) (state licensing of contractors on federal projects); *Mayo* v. *United States*, 319 U.S. 441 (1943) (state assessment of fertilizer inspection fee); *Johnson* v. *Maryland*, 254 U.S. 51 (1920) (state motor vehicle licensing requirements); *Ohio* v. *Thomas*, 173 U.S. 276 (1899) (state prohibition on using margarine in a federal soldiers' home); *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

[10] By contrast, the pleading provision of the McCarran Amendment would not bar the United States from presenting objections to state law requirements prior to initiation of a water right adjudication suit authorized by that Amendment —*e.g.*, when it sought to acquire a state law right.

e. In accordance with its assertion that the McCarran Amendment should be interpreted by "pa[ying] special attention to the Congressional policy underlying the language of the Amendment," Idaho devotes much of its brief to policy-based arguments. Idaho Br. 15, 29-40. Idaho relies principally on this Court's statement in *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800,

[11] Idaho posits that the United States' position will give it free reign to "stall or disrupt" state proceedings. Idaho Br. 28-29. There is no merit to Idaho's speculation. Idaho points to no specific instances in which the United States has raised an immunity defense "to procedures such as deadlines for filing claims, objections and responses, evidentiary exclusions, discovery requirements or state law requirements regarding finality of judgments" (Idaho Br. 29). Indeed, the United States has no foreseeable cause to complain about customary rules of judicial procedure, provided that they are applied in an even-handed manner. We may assume for present purposes that the McCarran Amendment's consent to suit includes consent to filing deadlines and state procedures for reviewing substantive claims on the merits, provided that the procedures are not aberrational and uniquely burdensome. The issue here, however, is whether the McCarran Amendment contains an unequivocal expression of consent to state *monetary* assessments, which cannot be found in a waiver of immunity to suit on non-monetary claims. That question must be answered on the basis of what the McCarran Amendment says, and not on the basis of the State's desire to proceed with its suit—and associated revenue-raising measures—entirely unimpeded by questions of sovereign immunity.

819 (1976), that "the McCarran Amendment bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights." It urges this Court to interpret the McCarran Amendment expansively in light of that policy so as to waive the United States' distinct immunity from filing fees. Idaho Br. 17, 29-31. According to Idaho, "so long as the procedure is part of a 'comprehensive state system' for the adjudication of water rights, the procedure is within the scope of the waiver." *Id.* at 29.

Idaho's argument fails on its own terms, because Idaho's filing fees are something quite different from the "procedures" used to adjudicate water rights. The filing fees simply provide revenue to pay the expenses of the court and another party. Idaho could conduct an adjudication that is procedurally identical in every respect using revenues from another source. In any event, Idaho's reliance on the "policy" of the McCarran Amendment, rather than the statutory language, is fundamentally flawed. This Court has rejected the notion that a statute should be interpreted by reference to its "broad purposes" rather than by careful analysis of the statutory text. See *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) (per curiam). As the Court explained:

> [N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice —and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.

Id. at 525-526 (emphasis in original). Thus, Idaho's basic interpretive approach is "plainly inconsistent

with important doctrines of statutory construction," *id.* at 526, especially as regards waivers of the United States' sovereign immunity.

Moreover, Idaho's argument is based on a misunderstanding of this Court's reference in *Colorado River* to "comprehensive state systems." 424 U.S. at 819. The Court explained that Congress has allowed joinder of the United States in general stream adjudications pursuant to the McCarran Amendment in response to the States' creation of "comprehensive" systems for adjudicating water rights, requiring the participation of all water users. See *ibid.* But this Court did not suggest that the McCarran Amendment waived the United States' immunity to any "State law" as long as it related to a "comprehensive state system." Rather, the Court simply recognized that the McCarran Amendment requires the existence of a "comprehensive" state adjudication that "reaches all claims" as a necessary precondition of joinder. *Id.* at 819-820. See *United States* v. *District Court in and for Water Div. No. 5*, 401 U.S. 527, 529-530 (1971).

Idaho accordingly is mistaken in arguing that the United States is automatically subject to filing fees because those fees are assessed in connection with a "comprehensive state system." Idaho Br. 29-31. Idaho has substantial latitude in fashioning a "comprehensive state system," including appropriate judicial procedures for adjudicating water rights, and it may join the United States as a defendant in the adjudication suit, provided that the McCarran Amendment's specific preconditions are met. But Idaho cannot demand that the United States *finance* those proceedings through the payment of filing fees, because Congress has not waived the United States' immunity from the State's proposed assessments.

Idaho's remaining policy arguments do not require extended discussion. Idaho attempts to justify its filing-fee regime on the grounds that: (i) Idaho drafted its adjudication statute in the expectation that the federal government would help finance the administrative expenses that the statute imposes (*id.* at 31); (ii) Idaho's filing fees do not violate the due process rights of private parties (*id.* at 33-35); and (iii) the United States supposedly benefits from the adjudication (*id.* at 37-40). Those arguments are all beside the point, because Idaho has failed to show that Congress has "unequivocally" consented to Idaho's assessment of filing fees against the United States. *Nordic Village*, 112 S. Ct. at 1014; cf. *Hancock* v. *Train*, 426 U.S. 167, 198-199 (1976).[12]

[12] Idaho makes several other arguments that warrant only brief mention. Idaho contends that "the United States admitted that the kinds of centralized services provided by Idaho and other states are an essential element of general stream adjudications" (Idaho Br. 31), citing a government brief filed in a Montana state court in 1987 (Idaho Br. 1a-42a). The United States filed that brief in response to a state court's use of "temporary preliminary decrees" to determine water right claims without giving the responsible state agency an opportunity to investigate and verify whether the claims were inflated. That brief says nothing about federal payment of filing fees. Idaho also suggests that the United States is not an "unwilling participant" in this suit, because representatives of certain federal agencies participated in the preparation of a technical committee report recommending the adjudication. See Idaho Br. 37-38. The committee report Idaho cites clearly states, however, that "this report is not a statement of position or opinion by any of the Committee members or their employers." Snake River Technical Advisory Committee, *Needed Water Resources Programs in the Snake River Basin* 3 (Nov. 1983).

3. As we explain in our opening brief (U.S. Br. 31-38), the McCarran Amendment not only lacks the requisite clear expression of congressional consent to filing fees, but the Amendment's "costs proviso"—which states that "no judgment for costs shall be entered against the United States in any such suit" (43 U.S.C. 666(a))—affirmatively indicates that the States are not entitled to impose monetary assessments against the United States.

Contrary to Idaho's characterization, we do not "portray the adjudication filing fee as a 'judgment for costs.'" Idaho Br. 40. Our point, instead, is that if Congress had intended that the United States share in the financing of state water adjudications, it would have allowed the States to recoup their expenses in the usual manner—through a judgment for costs. See U.S. Br. 5-6 (quoting Idaho Code § 42-1401 (1948), which authorized the State to recover its expenses of "examination and survey" through a judgment for costs). Congress made clear through the costs proviso, however, that a judgment for costs cannot be assessed against the United States. See U.S. Br. 31-32.

Idaho cannot avoid the clear import of the costs proviso by simply revising its adjudication statute so that assessments that were once collected through a "judgment for costs" are now collected through a "filing fee" mechanism. But that is exactly what Idaho has attempted to do here. The Idaho Code expressly states that the filing fees are assessed for the purpose of "financing the *costs* of adjudicating water rights." Idaho Code § 42-1414 (1990) (emphasis added). Idaho has attempted to evade Congress's prohibition on monetary assessments against the

United States through semantic legerdemain. See U.S. Br. 33-34.[13]

Idaho continues to insist that its fee assessments are distinguishable from a judgment for costs on the theory that the Director of Water Resources plays a "non-adversarial," "quasi-judicial" role in the adjudication suit. Idaho Br. 46-47. As we explain in our opening brief, that characterization is neither relevant nor accurate. The Director is designated by statute as a "party" who files "pleadings" with the court, Idaho Code §§ 42-1401A(7) & 1412(4) (1990), and the costs charged to the adjudication account and paid from the filing fees are indistinguishable from a judgment for costs. See U.S. Br. 35-38. Additionally, the State's claim that the filing fees will not be used to finance any litigation by the State

[13] Idaho also suggests that the costs proviso implicitly allows fee assessments, reasoning that "some states" charged filing fees when the McCarran Amendment was enacted, yet the proviso limits only judgments for "costs." Idaho Br. 42. See also Amici States Br. 20-23. Idaho overlooks the fact that Congress included the costs proviso to restrict the McCarran Amendment's judgment provision, which subjects the United States to the judgments of the court in a water adjudication. There was no need for Congress to include a "filing fees proviso" as well, because judgments are not used (under the Idaho statute or other statutes) to collect filing fees. Contrary to Idaho's assertions (Idaho Br. 42-43), it is not permissible to infer from the fact that some western States assessed filing fees at the time the McCarran Amendment was enacted, that Congress consented to the assessment of such fees against the United States—much less that it consented to Idaho's fee system. Only an express waiver of the United States' immunity to such exactions in the statutory text would suffice for that purpose, and the text of the McCarran Amendment contains nothing of the kind. U.S. Br. 30 n.12.

regarding federal reserved water rights (Idaho Br. 45 n.28) is incorrect.[14]

Even if Idaho were correct that "costs" and "fees" differ in this context, Idaho would still have failed to show the necessary waiver of immunity from fees. This Court expressly rejected similar reliance on congressional silence as a basis for finding a waiver of immunity in *Library of Congress*, 478 U.S. at 319 ("congressional silence does not permit us to read the provision as the requisite waiver of the Government's immunity"). Contrary to the position taken by Idaho, its amici and the Idaho Supreme Court, that principle is equally applicable here. See U.S. Br. 32.[15]

[14] The Director has asserted that he may file objections to federal reserved water rights, the adjudication bureau chief is paid from the adjudication account for such work, and the data used by the Director in objecting to federal reserved rights are developed using moneys paid from the adjudication account. Idaho's assertion also ignores the general litigation costs paid from the adjudication account, including costs for service of process, investigation for the Director's Report, preparation of the report, defense of the report, conduct of discovery, preparation of legal exhibits, drafting of pleadings, preparation of expert witnesses for trial, serving as witnesses at trial, and numerous other litigation-related expenses. See U.S. Br. 37.

[15] Idaho's reliance on legislative history (Idaho Br. 43-44) is misplaced for reasons we have already discussed. See pp. 8-9, *supra*. See Idaho Br. 43-44. The State identifies nothing in that history suggesting that Congress intended to prohibit a judgment for costs but to allow the assessment of filing fees serving the same purpose. Idaho simply points to a government witness's general statement that the McCarran Amendment would subject the United States to "17 different procedures." *Id.* at 44. See generally *Shell Oil Co.* v. *Iowa Department of Revenue*, 488 U.S. 19, 29 (1988) (statements of opponents to legislation do not provide authoritative inter-

For the foregoing reasons and the reasons stated in our opening brief, it is respectfully submitted that the judgment of the Idaho Supreme Court should be reversed.

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FEBRUARY 1993

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pretive guidance); see also *Garcia* v. *United States*, 469 U.S. 70, 76 (1984).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA,
Petitioner,

v.

STATE OF IDAHO, EX REL. DIRECTOR,
IDAHO DEPARTMENT OF WATER RESOURCES,
Respondent.

On Writ of Certiorari
To The Supreme Court of Idaho

BRIEF OF AMICI CURIAE NEZ PERCE TRIBE, KLAMATH TRIBE, TULE RIVER TRIBE, KLAMATH ALLOTTEE WATER USERS ASSOCIATION AND CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION IN SUPPORT OF THE UNITED STATES OF AMERICA

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INTEREST OF AMICI CURIAE

Amici curiae are four federally recognized Indian tribes and an association of Indian allotment owners.[1] All amici have claims to reserved water rights which may be adjudicated in state courts pursuant to the terms of the McCarran Amendment, 43 U.S.C. § 666(a).

When Indian tribes negotiated treaties with the United States they reserved enough water to fulfill the purposes underlying the establishment of their reservations. These federally reserved rights include water for agricultural uses and treaty-protected fisheries, whether the reservation was created by treaty or Executive Order. *Arizona v. California*, 373 U.S. 546, 598 (1963); *Winters v. United States*, 207 U.S. 564 (1908); *Department of Ecology v. Acquavella*, No. 77-2-01484-5, *Memorandum Opinion* (Yakima County Sup. Ct., May 22, 1990), *appeal docketed*, No. 57798-6 (Wash. S.Ct.) (treaty language identical to the Nez Perce Treaty); *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984); *see United States v. Winans*, 198 U.S. 371, 381 (1905).

Tribal water rights are held in trust by the United States for the benefit of tribes. As trustee, the United States prepares and advances tribal water claims in state or federal water adjudications. This Court has made clear that the United States, as trustee in water cases, is not held to the high fiduciary standards of a private trustee. *Nevada v. United States*, 463 U.S. 110 (1983). Thus, tribes must participate in their own name in water adjudications if they are to assure that their rights are fully asserted. *Id.*

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[1] Filed herewith is Idaho's consent to the filing of this brief.

The preparation and assertion of tribal water claims is an enormously expensive undertaking requiring biologists, hydrologists, engineers, historians, anthropologists and economists. The Idaho statutory scheme adds an exorbitant burden to simply file a water rights claim. Budgets for water rights claim development are already inadequate and imposition of "filing fees" to bankroll state water adjudications will make it virtually impossible for tribes to effectively bring their claims. Just as the now defunct poll tax prevented racial minorities from exercising their right to vote, the imposition of these filing fees will effectively deny Indian tribes the ability to quantify their reserved water rights.

The Nez Perce Tribe is directly affected by the decision of the Supreme Court of Idaho because the Nez Perce Reservation lies within the Snake River Basin Adjudication area. The treaties which established the Nez Perce Reservation expressly reserved fishing rights both on and off the Reservation.[2] 12 Stat. 957, art. III (June 11, 1855); 14 Stat. 647 (June 9, 1863). These rights have since been interpreted to provide a right of up to fifty percent of the available fish harvest. *Sohappy v. Smith*, 302 F.Supp. 899, 911 (D. Or. 1969);[3] *see Washington v. Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979). For the past five years the Nez Perce Tribe has been working with the Bureau of Indian Affairs, the Department of the Interior Solicitor's Office and the Department of Justice

[2] The Confederated Tribes of the Umatilla Indian Reservation in Oregon have water rights claims based on treaty language similar to that of the Nez Perce Treaties.

[3] A description of the lengthy history of this litigation is found in United States v. Oregon, 913 F.2d 576 (9th Cir. 1990).

to develop the claims that will be made in the Snake River Basin Adjudication on behalf of the Tribe.

In Oregon, the United States is now facing state administrative proceedings to quantify federal and, as the Klamath Tribe's trustee, tribal water rights in the Klamath River Basin Adjudication. The existence of the tribe's rights was declared in *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984), but the quantification was left to later proceedings.[4] In these proceedings, the Tribe's right to water to support its treaty-protected fishing, hunting and gathering rights will be quantified. These water rights are essential to the survival of the Tribe since the various fish and wildlife species upon which the Tribe depends are themselves dependent upon an adequate supply of water.

Oregon, like Idaho, asserts authority to exact "filing fees" from the United States, on pain of forfeiture of federal water rights, to "pay for the expenses of the [Water Resources] department" in registering and determining water rights claims. Or. Rev. Stat. § 539.081(4). The statutes are ambiguous as to the amount of fees for large federal water claims such as those for instream flows, wetlands, or lake maintenance. *See* Or. Rev. Stat. § 539.081(1).[5]

[4] For a description of the water rights of the Klamath Allottees, *see* United States v. Adair, 723 F.2d at 1415-17.

[5] These fees were unsuccessfully challenged in United States and Klamath Tribe v. State of Oregon, Dep't of Water Resources, 774 F.Supp. 1568 (D. Or. 1991). While the Oregon fees statutes currently exempt federal claims for non-consumptive uses on behalf of Indian tribes, the State continues to assert authority to exact fees for claims for tribal consumptive uses and all non-Indian federal uses such as forestry, parks, fisheries and wildlife.

The Tule River Tribe in California occupies a reservation that was established in 1873 pursuant to an Executive Order. I Kappler, *Indian Affairs—Laws and Treaties* 830-31 (GPO, 1904). The Tule River Tribe has continuously used the waters of the South Fork of the Tule River, although the Tribe's water rights have not been formally adjudicated. This is a common situation in California. Of the nearly 100 tribes in California only five have adjudicated water rights. If the Idaho Supreme Court's decision is upheld, the State of California will have license to impose a filing fee scheme similar to that of Idaho to finance its own water rights adjudication.

Amici curiae have a vital interest in the outcome of this case. Their water rights are protected by the United States as trustee. Consequently, any implied waiver of federal immunity directly affects them.

SUMMARY OF ARGUMENT

The Idaho Supreme Court's decision authorizes the financing of Idaho's general stream adjudication by charging the United States an estimated ten million dollars in "filing fees." Such fees will undermine the capability of the United States as trustee to assert reserved water right claims on behalf of Indian tribes by diminishing the limited financial resources available to develop and assert the merits of tribal claims. If Idaho can shift the expense of its water adjudication to federal coffers, other western states will be encouraged to do the same.

The Idaho Supreme Court's ruling runs contrary to the law of federal immunity from suit. Strict adherence to this doctrine of immunity is especially important where, as here, Indian property rights and tribal immunity are implicated.

ARGUMENT

I. THE IDAHO SUPREME COURT'S DECISION SEVERELY UNDERMINES THE ABILITY OF INDIAN TRIBES, AND THE UNITED STATES AS TRUSTEE, TO ASSERT AND DEFEND TRIBAL WATER RIGHTS IN IDAHO AND OTHER WESTERN STATES.

Indian tribes will, as a practical matter, be significantly and adversely affected by the decision below. In its capacity as trustee, the United States must file water right claims on behalf of Indian tribes with reserved water rights. This Court has ruled that tribes are bound by state court decrees even if they do not participate in the adjudication and even if the United States does not claim all rights to which the tribe is entitled. *Nevada v. United States*, 463 U.S. 110 (1983); *see Heckman v. United States*, 224 U.S. 413, 444-445 (1912). There are hundreds of tribes with unadjudicated reserved water rights. General stream adjudications are intended to finally adjudicate the rights of all parties. As such, Indian tribes, and the United States on their behalf, must claim sufficient water to provide for present and future needs. *Arizona v. California*, 460 U.S. 605, 617 (1983).

Tribal claims for water encompass not only those amounts necessary for irrigation but also for water to support guaranteed hunting and fishing rights. These latter claims are particularly difficult and expensive to establish and require extensive technical studies by historians, engineers, anthropologists, hydrologists and biologists. The cost for these expert witnesses and consultants is enormous. The United

States supports the bulk of these costs and provides limited funding for the tribes to oversee and supplement the claims developed by the United States. Such monitoring is absolutely essential, given this Court's ruling in *Nevada v. United States*, 463 U.S. 110, 142 (1983) that the United States may be forced to balance its tribal trust obligations in water cases with other federal interests.

The State of Idaho commenced the Snake River Basin Adjudication as part of a complicated settlement of water rights litigation unrelated to tribal rights. Pet. App. 28a (Johnson, J. dissenting). Although not yet a party to the Adjudication, the Nez Perce Tribe has expended considerable amounts of its scarce financial and human resources in assisting the United States, which is a named party, in preparing claims on behalf of the Tribe. The Tribe does not have additional resources to expend in claims preparation. As a result, if the limited federal resources must be expended on filing fees, the Tribe's rights will be at risk.

There is no line item in the federal budget for filing fees. If the Bureau of Indian Affairs is required to pay the exorbitant "filing fees" at issue in this case, the funds available to prepare for the merits of the case will be decimated. The required filing fees will be significantly greater than the annual federal budget available for proof and defense of tribal water rights. Payment of the fees will reduce the already inadequate federal funds available to establish tribal water rights.

Water is a matter of increasing value and dispute throughout the West. As competition for this limited resource grows, the pressure on states to undertake

expensive adjudications of water rights increases. At the same time, states face budget limitations and the need for additional revenues. For example, California's difficulty adopting an effective budget for fiscal year 1993 was widely publicized. And Oregon's state government is saddled with enactment of a ballot initiative that greatly diminishes property taxes and, thus, general fund revenues. The incentive to shift the costs of water adjudications from state to federal budgets is powerful.

If Idaho is successful in its attempt to bankroll its water adjudication at federal expense, other states would be foolish not to follow suit. For its part, Oregon already has enacted laws to impose "filing fees" on the United States. These statutes specify fee amounts for water used for irrigation. Or. Rev. Stat. § 539.081(1). But they are silent as to the amount to be charged for the types of claims that make up the bulk of federal water rights—instream flows, lake level maintenance, and marshlands for fish and wildlife purposes. In the Klamath River Basin Adjudication, Oregon has yet to specify the amount it will demand that the United States pay as "filing fees." The Idaho precedent will establish a benchmark for Oregon's fee calculations.

California has over ninety Indian tribes with unquantified water rights, several major cities with growing water demands, and severe state budget limitations. It is hard to imagine a better incentive for taking advantage of a successful effort by Idaho to use federal money to pay for water adjudications.

Unless the Idaho Supreme Court decision is reversed, tribal reserved water rights will become the victim of states shifting costs in general stream ad-

judications from themselves to the federal government.

II. WAIVERS OF SOVEREIGN IMMUNITY ARE TO BE NARROWLY CONSTRUED, ESPECIALLY WHERE, AS HERE, THE RIGHTS OF OTHER SOVEREIGNS ARE AFFECTED.

It is well settled that implicit waivers of federal immunity are disfavored. Such waivers must be explicit on the face of the statute. *See* Brief of the United States. Amici believe that application of that rule alone mandates reversal of the Idaho Supreme Court's decision. This case, however, implicates more than just federal immunity. The McCarran Amendment, 43 U.S.C. § 666(a), as construed by this Court allows state courts to adjudicate tribal property rights in general stream adjudications. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 810 (1976). Because the rights of another sovereign are implicated, this Court should be especially careful to limit the bounds of the waiver of immunity found in the McCarran Amendment.

Important federal rights are at issue in state court cases brought pursuant to the McCarran Amendment. As this Court cautioned in holding that Indian reserved rights were subject to adjudication in state courts under the McCarran Amendment:

> State courts, as much as federal courts, have a solemn obligation to follow federal law. Moreover, any state-court decision alleged to abridge Indian water rights protected by federal law can expect to receive, if brought for review before this Court, *a particularized and exacting scrutiny* commensurate with the

> powerful federal interest in safeguarding those rights from state encroachment.

Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 571 (1983) (emphasis added). This exacting scrutiny is especially appropriate in a case such as this where a state seeks to finance its adversarial expenses by reaching into the federal treasury and removing funds that would otherwise be available for the protection of tribal resources.

"As separate sovereigns, pre-existing the establishment of the Constitution," *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978), it is well settled that Indian tribes possess immunity from suit and that Congress has "consistently reiterated its approval of the immunity doctrine." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, ___ U.S. ___, 111 S.Ct. 905, 910 (1991). This immunity is grounded in the recognized need to protect tribal property and resources from unconsented suit.

However, as a result of the combined effect of the McCarran Amendment and the federal government's trust relationship to tribes, the Nez Perce Tribe's water rights will be adjudicated in state courts, regardless of whether or not the Tribe chooses to voluntarily waive its immunity and participate in its own right. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 810 (1976). The ruling of the Idaho Supreme Court allowing imposition of onerous filing fees will further diminish the Tribe's rights. The effect of the Idaho Court's ruling extends the McCarran Amendment's waiver well beyond what is necessary to accomplish the purpose of the Amendment, *i.e.*, placing federal and tribal water rights before state courts. Since the McCarran Amendment

subjects Indian water rights to state court jurisdiction through its waiver of federal sovereign immunity, the waiver should be narrowly construed to provide only the forum—and not a right to raid the federal treasury.

The State of Idaho undoubtedly will assert that tribal treasuries are not at risk because the United States has a "deep pocket" and thus is able to pay the filing fees on behalf of the tribes. Experience dictates, however, that the tribes must not rely solely on the good will of the United States. In cases where the United States determines that a particular tribal claim should not be made, the tribe will be forced to stand alone, make the claim, and thus could be subject to filing fees that, as a practical matter, will preclude an effective defense of such claims.[6] Even in the rare circumstance where the federal government makes all claims asserted by a tribe, the United States' practical ability to represent all tribal interests will be severely undermined, because its financial resources will necessarily be reduced by the amount of the filing fees.

CONCLUSION

History demonstrates the enormous difficulty tribes have had in securing federal protection of their rights. As the National Water Commission stated in 1973, "In the history of the United States Government's treatment of Indian tribes, its failure to protect Indian water rights for use on the Reservations it set aside for them is one of the sorrier chapters." Nat'l

[6] The assertion of filing fees directly against Indian tribes would fail under the reasoning of this Court's ruling in Tulee v. Washington, 315 U.S. 681 (1942).

Water Comm'n, Water Policies for the Future—Final Report to the President and to the Congress ofthe United States 475 (GPO, 1973). The Idaho Court's decision places yet another formidable obstacle in the path of Indian tribes. It should be reversed.

Respectfully submitted,

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No. 92-190

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UNITED STATES OF AMERICA,

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v.

STATE OF IDAHO, ex rel.
DIRECTOR, IDAHO DEPARTMENT
OF WATER RESOURCES,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF IDAHO

Brief of Amici Curiae the States of Alaska, Arizona, California, Colorado, Montana, Nevada, Oregon, Utah, Washington, and Wyoming

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QUESTION PRESENTED

Whether the McCarran Amendment, 43 U.S.C. § 666(a), waives the United States' right to plead immunity from Idaho's general stream adjudication procedures, including payment of filing fees for special services rendered by the Idaho Department of Water Resources and judiciary to all claimants.

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INTEREST OF AMICI

Adjudications of water rights in the river basins of the western States are massive, complex and expensive proceedings. Adjudicating the competing claims for this scarce resource requires comparing and settling priorities for all claims, and no adjudication can be effective without the participation of all claimants. The United States is the largest single claimant to water in the West, owning approximately 61 per cent of the land in the 11 coterminous western States and 65 per cent of the land in Idaho.

Amici States have ongoing adjudications that include the United States' water rights claims. The Amici States also have administrative agencies that perform non-adversarial, technical functions similar to those performed by the Idaho Department of Water Resources. Like the Snake River Basin Adjudication, adjudications of other large river basins frequently involve thousands of parties and claims based on uses dating back a century or more. Agency investigation, analysis and correlation of these claims is a difficult and expensive undertaking, but it is far simpler and more efficient than piecemeal adjudication, in which one or several parties would be forced to join others with competing claims. To fund the agencies' services, many States assess claimants a filing fee based on the amount of water rights they claim. The Amici States that assess filing fees have an interest in ensuring that each claimant, including the United States, pays its share. The Amici States that do not assess fees have an interest in ensuring that the United States shares the same burdens and benefits as any other claimant.

SUMMARY OF ARGUMENT

Congress has long recognized the primacy of the western States' interest in allocating water resources within their boundaries, even where the United States claims rights to substantial amounts of water. To make it possible for States to make a

complete determination of water rights within a river system, the McCarran Amendment, 66 Stat. 560, 43 U.S.C. § 666, authorizes States to join the United States as a defendant in suits to adjudicate these rights. In sweeping terms, the Amendment waives the United States' sovereign immunity from application of "the State laws" governing adjudications. Not only are the terms of the McCarran Amendment unequivocal, but the legislative history of the Amendment demonstrates that Congress intended the United States to follow the same rules as any other citizen whose water rights are being adjudicated.

The only exception to this broad waiver of immunity is the proviso "That no judgment for costs shall be entered against the United States . . . ." Textually, the exception is limited to cost judgments imposed at the end of litigation, which shift costs between parties, not filing fees paid up front to defray state administrative expenses in investigating the parties' water rights claims. Nor does the legislative history support the proposition that filing fees are a type of cost included within the exception. When the McCarran Amendment was adopted, state water rights laws routinely distinguished between the two. Moreover, Congress understood that the United States would be required to pay fees to the various States to defray the cost of administrative services those States provided.

Given the plain language of the McCarran Amendment, the context in which it was enacted, and the legislative history that underscores Congress' intent, the United States is wrong in asserting immunity from its obligation to pay the same filing fees that all other parties to water rights adjudications must bear.

ARGUMENT

The question presented is narrow. There is no dispute that the McCarran Amendment waives the federal government's sovereign

immunity. The United States recognizes, as it must, that the Amendment requires the federal government to participate in and be bound by state water rights adjudications. The only question is the scope of the waiver Congress intended. The United States argues that Congress intended that the federal government would be bound by "substantive state laws governing the 'acqui[sition of] water rights by appropriation,'" but not by state procedural rules that govern water rights adjudications.[1] Pet. Br. 24–25 (brackets in original).

The United States' argument is troubling. If the United States were correct, the federal government would not be required to follow state procedural rules designed to ensure the orderly and fair resolution of competing water rights claims. It could disregard state deadlines for filing notice of any water rights it claimed. It could decline to follow rules of evidence that govern other water rights claimants. Or it could file appeals from adverse rulings long after the time for other parties to appeal had passed. To be sure, Congress could have waived only part of its sovereign immunity, as the United States argues. But it is difficult to see why Congress would have required the federal government to participate in state water rights adjudications without also requiring the government to adjudicate its water rights at the same time and in the same manner as other claimants. Neither the text of the McCarran Amendment nor its legislative history supports such an anomalous result.

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[1] Although the specific procedural rule at issue here is the requirement that the United States pay filing fees for the water it claims, the United States stakes out a far broader position. It argues that Congress only waived the government's immunity from substantive state laws governing the appropriation of water rights. Pet. Br. 24–25. It acknowledges but never squarely addresses the fact that its argument, if correct, means that Congress did not intend the United States to be bound by *any* state procedural rule. *See* Pet. Br. 26–28.

The issue divides into two related but separate questions. The first is whether Congress intended to waive the United States' sovereign immunity to state procedural rules generally. More specifically, when Congress expressly barred the United States from pleading that it was not amenable to "State laws . . . by reason of its sovereignty," did Congress intend to include both substantive and procedural laws in the waiver? If it did, the second question is whether a specific exception to this general waiver — that no "judgment for costs" shall be entered against the United States — includes filing fees.

I

On the first question, the United States begins from the proposition that the scope of the waiver expressed in the McCarran Amendment must be judged solely from the statutory text and that no waiver will be found if that text is ambiguous. Focusing on the text, the government argues that because the McCarran Amendment is at least ambiguous as to whether state procedural rules will bind the United States when it participates in water rights adjudications, Congress did not waive the United States' sovereign immunity from these rules. In the States' view, the United States both employs the wrong method of analysis and misapplies the method it uses.

A

The Court has recognized that, as a general rule, a waiver of sovereign immunity will not be found unless the text of the statute is unambiguous. *United States v. Nordic Village*, 112 S. Ct. 1011, 1014 (1992). The Court has also recognized, however, that this general rule does not apply to all statutes. *Ibid.* When a statute contains a broad waiver of sovereign immunity, the Court has neither looked solely to the statutory text to determine the scope of the waiver nor has it required that the scope of the

waiver be stated unambiguously. *Ibid.* (citing *Franchise Tax Board v. United States Postal Service*, 467 U.S. 512 (1984); *Block v. Neal*, 460 U.S. 289 (1983); *United States v. Yellow Cab Co.*, 340 U.S. 547 (1951)). Rather, it has employed a searching analysis of both the text and the legislative history to determine how much of the government's sovereign immunity Congress intended to waive.

The McCarran Amendment falls squarely within this latter class of statutes. Like the broad waivers of sovereign immunity the Court noted in *Nordic Village*, the McCarran Amendment's consent for the federal government to be joined in a state water rights adjudication is "all-inclusive." *United States v. District Court for Eagle County*, 401 U.S. 520, 523 (1971). And the Court has declined to construe the McCarran Amendment's waiver of sovereign immunity narrowly. *Id.*, at 523–25. Not only does the McCarran Amendment contain a broad waiver of sovereign immunity that takes it out of the general rule stated in *Nordic Village*, but the Court repeatedly has looked to the purpose and the legislative history of the McCarran Amendment to resolve textual ambiguities about the scope of the waiver.

The Court, for example, looked to the Senate Report and the subcommittee hearings in *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 811–12 (1976), to determine whether the McCarran Amendment waived immunity to adjudicate reserved Indian water rights. The statutory text did not answer that question unambiguously, and if the Court had employed the method of analysis the United States urges here, it would have reached a different conclusion than it did. Similarly, the text of the McCarran Amendment does not unambiguously resolve whether the United States waived immunity to have federal reserved water rights adjudicated in a state proceeding.

Yet, the Court looked to the purpose of the Amendment to conclude that the reference in the statute to "otherwise" acquired water rights included these federal rights. *United States v. District Court for Eagle County*, 401 U.S., at 524; *see Colorado River Water Conservation District v. United States*, 424 U.S., at 810 (explaining the holding in *Eagle County*). The method of analysis the United States urges here cannot be reconciled with either the exception recognized in *Nordic Village* for broad waivers of sovereign immunity or with the method of analysis the Court consistently has employed in interpreting the McCarran Amendment.

With these principles in mind, this brief turns to the text and legislative history of the McCarran Amendment.

B

The terms of the McCarran Amendment are clear. The first sentence provides that the United States may be joined as a defendant in any suit for the adjudication of water rights or the administration of those rights. 43 U.S.C. § 666(a). The second sentence provides that when the United States has been joined in such a suit, it "shal[l] be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty." 43 U.S.C. § 666(a). Congress could not have been clearer. It waived the government's right to claim in a state water rights adjudication that sovereign immunity excused it from complying with "the State laws." Read in its usual sense, the phrase "the State laws" includes all laws applicable to a state water rights adjudication.

Certainly, nothing in the language Congress used expressly limits the waiver to substantive state laws generally or to substantive state laws governing the appropriation of water, as the government argues. Rather, the statute refers to "State laws"

in the plural, demonstrating an inclusive not a limited waiver. Nor does the context in which the phrase is used suggest any intent to limit the scope of the waiver. To the contrary, it would make little sense to require the federal government to participate in state water rights adjudications but not follow the procedural rules that provide for the orderly and fair resolution of all the parties' competing claims. Giving the government a free hand to avoid any procedural rule it found objectionable would be directly contrary to Congress' recognition that "comprehensive state systems for adjudication of water rights" are the best means for quantifying water rights in the western States. *See Colorado River Water Conservation District v. United States*, 424 U.S., at 819. The power to ignore state procedural rules, which the United States claims, would allow the federal government to stall or disrupt the very proceedings in which Congress intended it to participate.[2]

The United States advances primarily one argument to defeat or at least call into question the plain meaning of the phrase "the State laws." It argues that this phrase should be read to mean the same thing as the phrase "State law" in the first sentence in the McCarran Amendment. Not only are the two phrases not identical,[3] but the context in which they are used refutes the

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[2] It is no answer to say that the government can always comply with state procedural laws voluntarily, even though it is immune from their application. When Congress was considering the McCarran Amendment, the United States told the subcommittee that there was no need to waive any of the government's sovereign immunity because the government could always voluntarily submit a statement of its claims to the state adjudication. Hearings on S. 18 before the Subcommittee of the Senate Committee on the Judiciary, 82d Cong., 1st Sess., 3–4 (1951). Congress did not find that alternative sufficient.

[3] The first phrase is singular; the second, plural. The first phrase is used as part of a prepositional phrase to identify one source of the United States'

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notion that one phrase was intended to draw its meaning from the other. *See United States Department of Energy v. Ohio*, 112 S.Ct. 1627, 1637 (1992) (looking to context to clarify a term's meaning). The first sentence refers to the United States' "acquiring water rights by appropriation under State law," and the phrase "State law" identifies one source of the federal government's water rights. Put another way, the "State law" identified in the first sentence is a body of law under which the United States receives a benefit. The phrase "State laws" is used in the second sentence to identify something quite different — a body of rules the United States cannot avoid when it is joined in a water rights adjudication.

Assigning one meaning to these two phrases leads to incongruous results. The United States has little interest in asserting immunity to avoid those state laws identified in the first sentence — those laws under which it is acquiring water rights. Yet, if the United States' argument is correct, the only point of the second sentence would be to forbid the United States from contesting the application of laws that benefit it. One hesitates to attribute such illogic to Congress, and the general rule of statutory construction on which the United States relies cannot be used to create a plausible ambiguity in the statutory text. Indeed, the Court previously has rejected the government's argument that the reference to the United States' acquisition of water rights under state law defines the scope of other terms in the McCarran Amendment. *See United States v. District Court for Eagle County*, 401 U.S., at 524 (declining to limit the waiver for

[3](...continued)

right to appropriate water. The second is not used to modify anything. Rather, it is the subject of a dependent clause that identifies what Congress has waived.

"otherwise" acquired water rights to rights acquired under state law). There is no reason to retreat from that conclusion here.

Perhaps recognizing the difficulty with this position, the United States advances an alternative rationale. It appears to argue that whatever else the McCarran Amendment waives, it does not waive immunity from fees because a separate, express waiver of immunity is required for either fees or costs. *See* Pet. Br. 29–30.[4] Not only is this argument contrary to the typical method for analyzing the McCarran Amendment, but the United States points to no case that says that immunity from fees must be waived either expressly or separately. The one case the government cites for this proposition, *Library of Congress v. Shaw*, 478 U.S. 310, 314 (1986),[5] reasons that a general consent to suit is not sufficient to waive immunity from interest in light of the long-standing rule that interest may not be awarded against the United States. *Shaw* says nothing about fees, and the United States points to no comparable long-standing rule that the United

[4] The United States raises a similar argument earlier. It states that "a congressional waiver of sovereign immunity does not subject the United States to *monetary* liability — particularly liability for fees and costs associated with the adjudication itself — unless the consequence is specifically set out in the statutory text." Pet. Br. 16 (emphasis in original). The United States reads too much into the three cases it cites to support this proposition. Two of the cases, *United States Department of Energy v. Ohio*, *supra*, and *United States v. Nordic Village*, *supra*, did involve monetary claims against the government, but neither stated a different rule for monetary claims than other claims. The third case, *Library of Congress v. Shaw*, 478 U.S. 310 (1986), is far narrower than the rule the United States draws from it and is discussed below.

[5] *See* Pet. Br. 30.

States is immune from paying fees to States for services those States provide,[6] which is the predicate for *Shaw*'s rule.

Indeed, far from supporting the United States, *Shaw* recognizes that when Congress waives the United States' sovereign immunity and makes "specific reference to state law for the rules of decision," it has been careful to provide that the United States is *not* liable for interest "in order to make clear that the United States' immunity from interest does not turn on state law." *Library of Congress v. Shaw*, 478 U.S., at 309–10 n. 6 (discussing the Federal Tort Claims Act). Under this reasoning, the McCarran Amendment's equally "specific reference to state law for the rules of decision" would require that Congress provide that the United States is not subject to filing fees "in order to make clear that the United States' immunity from [such fees] does not turn on state law." *See ibid.*

This is precisely the course Congress took with costs. It expressly excepted costs from the McCarran Amendment's broad waiver of immunity to "State laws" to make clear that the United States remained immune from costs under state law. Congress, however, did not also except fees. And absent some showing that the exception for "costs" includes fees, the limited exception Congress crafted demonstrates that the United States remains subject to state laws requiring filing fees, which were a recognized part of many States' water laws when Congress passed the McCarran Amendment. *See infra* at 20–23.

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[6] All the United States identifies is a practice reflected in notes to federal legislation that the United States is not required to pay fees in federal courts. *See* Pet. Br. 21 n. 6. The fact that Congress may not require the United States to pay for federal services provides no support for the proposition that the United States is immune from paying fees for any state services it receives.

In the States' view, only one plausible reading of the text of the McCarran Amendment is possible. Congress intended the second sentence of the Amendment to waive sovereign immunity as a defense to complying with both state substantive and state procedural rules, including filing fees, in a state water rights adjudication.

The same answer follows if the Court looks beyond the text of the McCarran Amendment to its legislative history, as it consistently has done. The McCarran Amendment was proposed to remedy a recurring problem in the arid and semi-arid western States. The United States held claims to a substantial quantity of water rights in these States, but it consistently refused to participate in state adjudications designed to settle the priority of claims to particular rivers or water systems. Hearings on S. 18 before the Subcommittee of the Senate Judiciary Committee, 82d Cong., 1st Sess., 3–4 (1951). The United States instead invoked its sovereign immunity and settled disputes or brought class actions in federal court to resolve disputes it could not settle. *Id.*, at 2–3, 6–7, 9, 27.

The United States' litigation strategy was not well received. As witnesses before the Senate Subcommittee explained, the United States' water rights were of such magnitude that its refusal to participate in comprehensive state water rights adjudications effectively prevented the state proceedings from going forward. *Id.*, at 48. The United States' settlement efforts with individual water rights claimants were also viewed as unsatisfactory because, as one Senator put it during the hearings, the government's immunity from suit put the private parties negotiat-

ing with the government "over the barrel."[7] And the government's use of a class-action in federal court was seen as putting other water users at a procedural disadvantage. *Id.*, at 27, 38. Senator Watkins, the chair of the Senate Judiciary Subcommittee that considered the bill, summed up the problem that concerned Congress:

> I just feel that the United States is trying to talk double on the thing. They come in and take advantage of everything that is good for them [under state water law] and keep all the time in a position where they do not have any of the liabilities [under state law] if they can avoid them [by invoking sovereign immunity]. I feel that something ought to be done about that.

Id., at 35.

The McCarran Amendment was Congress' answer to this problem. What is now the text of the McCarran Amendment was drafted in two stages. As initially proposed, the bill gave consent to join the United States in any suit for the adjudication or administration of water rights, but it did not expressly waive the United States' sovereign immunity from complying with state

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[7] During the hearing on the McCarran Amendment, Senator Watkins, the chair of the Judiciary Subcommittee, noted:

> You say that you can settle amicably these matter[s — water rights disputes]. Why is that [the farmers and ranchers] are willing to settle amicably? Because you have them over the barrel. They can't take you anywhere else. They can't go into court and fight for their rights. They have to take what you give them. Of course you can work out a settlement if you have a fellow who hasn't any weapons to fight with.

Hearings on S. 18 before the Subcommittee of the Senate Judiciary Committee, *supra*, at 7.

laws. *See id.*, at 1 (setting out the text of the proposed bill).[8] Although the initial draft of the bill only referred to the United States' being joined as a defendant in state water rights adjudications, the representative for the United States Department of Justice, Mr. Veeder, testified that "the implications of this legislation go far beyond the few words contained in it." *Id.*, at 16. He explained that Congress' consent to the United States' being joined in a state water rights adjudication would waive immunity from the application of state substantive doctrines, such as laches.[9] *Ibid.* He also explained that consent to state jurisdiction would require the United States to comply with state procedural rules. Mr. Veeder testified:

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[8] The initial draft of the bill provided:

> That consent is hereby given to join the United States as a defendant in any suit for the adjudication of rights to the use of water of a river system or other source or for the administration of such rights where it appears that the United States is the owner or is in the process of acquiring water rights by appropriation under State law, by purchase, exchange, or otherwise and that the United States is a necessary party to such suit: *Provided*, That the United States shall have the right of removal to the Federal court of any such suit in which it is a party: *Provided further*, That no judgment for costs shall be entered against the United States in any such suit. Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

Hearings on S. 18 before the Subcommittee of the Senate Judiciary Committee, *supra*, at 1.

[9] Mr. Veeder testified:

> Again, I repeat, Senator, the implications of this legislation go far beyond what appears in the few words contained in it. It would subject us not only to suit, but it would carry with it the possible loss of some of our most valuable rights [through the application of the state doctrine of laches].

Hearings on S. 18 before the Subcommittee of the Senate Judiciary Committee, *supra*, at 16.

> You not only have a waiver of immunity, you subject us to the administration of every State. We would be forced — I went back and checked this when I got through with my last conversation with you — we would be forced to have 17 different procedures west of the one hundredth meridian in which to try our litigation.

Id., at 14.

The Senate Subcommittee did not share Mr. Veeder's concerns about the breadth of the waiver. To the contrary, the subcommittee members expressed the view that the United States should be required to comply with state law. Senator Watkins, the Senator from Utah, responded that if the United States were going to acquire water rights, "the people of Utah are vitally interested in seeing that the United States goes the full distance, and not only claims all the assets that go along but takes a few of the liabilities and subjects itself to the courts there and has those rights determined." *Id.*, at 14.[10]

The subcommittee hearings make clear that even if the McCarran Amendment had been adopted as it was initially drafted, both the proponents and the opponents of the bill

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[10] Senator Watkins later expressed the view that being forced to comply with the procedural laws of the different western States was simply a consequence of the vast water rights the United States claimed. When a witness in favor of the bill explained that requiring the government to comply with the procedural laws of the different states was not difficult, Senator Watkins posed the following rhetorical questions:

> Senator Watkins: You take any corporation, for instance, that has business in 17 States; it probably has to comply with the law of 17 States.
>
> Mr. Saunders: Exactly.
>
> Senator Watkins: If it did not want to have to comply with 17 different laws, then it should cut its operations down to the size that it does want to take on.

Hearings on S. 18 before the Subcommittee for the Senate Judiciary Committee, *supra*, at 27.

understood that the United States would be required to follow the procedural laws of the various States. As the representative for the Department of Justice put it, the mere consent to be joined in state water rights adjudications "would . . . forc[e]" the federal government to comply with the different procedural rules of each State. *Id.*, at 14.

The proposed bill, however, was amended to make Congress' intent clearer. A witness for an association of western water users, Mr. Saunders, told the subcommittee that the bill should be more explicit than it already was. *Id.*, at 23. He explained that it was his association's "fundamental proposition that when the United States becomes an appropriator of water in a Western State it shall take on exactly the same status and burden as any private appropriator." *Id.*, at 25. Although his association had proposed an alternative bill, Mr. Saunders told the subcommittee that "whatever language would accomplish those purposes would meet with our favor." *Id.*, at 33. Mr. Saunders' also proposed that the bill make clear that the waiver of immunity did not apply to a pending dispute between California and Arizona over the Colorado River. *Id.*, at 32.

The chair of the subcommittee appeared quite receptive to Mr. Saunders' views about amending the bill,[11] and after the subcommittee hearings were completed a proviso was added to

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[11] After Mr. Saunders stated that he was going to suggest "a little different form to the bill and some suggested changes here," Senator Watkins responded that the bill "doesn't quite meet my idea of how it ought to be handled at the moment." Hearings on S. 18 before the Subcommittee for the Senate Judiciary Committee, *supra*, at 30. Senator Watkins then noted that "if we determine a line of action, we hope we can get together and draft a bill that can stand up reasonably well." *Ibid.* When Mr. Saunders later referred to his associations' proposed bill, Senator Watkins replied that although he could not say what the committee would ultimately do "if you have a bill, it may help us draft a bill." *Id.*, at 32.

the bill. *See* S. Rep. No. 755, 82d Cong., 1st Sess., 1 (1951) (setting out the proviso as an amendment to the bill). The first part of the proviso stated that the bill did not apply to disputes over interstate rivers, as Mr. Saunders had suggested. *See ibid.* The second part of the proviso stated that "When the United States shall be a party to any such suit it shall be deemed to have waived any right to plead that the State laws are not applicable, or that the United States is not amenable thereto." *Ibid.* To avoid ambiguity, this second sentence was later moved from the proviso to the body of the bill itself. S. Rep. No. 755, Part 2, 82d Cong., 2d Sess., 2 (1952).

Mr. Saunders' testimony before the Senate Subcommittee is the apparent source of what is now the second sentence in the McCarran Amendment. His concern that the United States be subject to exactly the same rules as any private party participating in a state water adjudication is mirrored in the second sentence, which provides that the United States may not plead that it is not amenable to the state laws in any water rights adjudication. The point of what is now the second sentence of the McCarran Amendment was to make clear that the United States stands in the same position in state court as any other water user: It is bound by the same substantive and procedural rules that apply to everyone else. The United States' contrary interpretation of Congress' language finds no support in the legislative history.[12]

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[12] *Library of Congress v. Shaw*, *supra*, is not to the contrary. In *Shaw*, the Court held that a provision in Title VII making the United States liable "the same as a private person" did not waive the government's immunity from interest, 478 U.S. 319–20, but its reasoning is narrower than the United States suggests, *see* Pet. Br. 30 n. 11. The Court reasoned in *Shaw* that because the United States could not be sued as a Title VII defendant when Congress equated the government's liability with that of a private person, the waiver of immunity was necessarily limited to those fees that could be assessed against

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II

Although the McCarran Amendment waives the United States' ability to refuse to comply with state procedural laws generally, it specifically carves out an exception to that general waiver. A proviso to the Amendment states "[t]hat no judgment for costs shall be entered against the United States" in any suit to adjudicate or administer water rights. 43 U.S.C. § 666(a). The issue that remains is whether this exception to the McCarran Amendment's broad waiver of sovereign immunity includes filing fees as a species of costs. On this point, the United States raises or suggests a number of issues that, in the States' view, have little relevance. It is accordingly helpful to identify initially what is and is not at issue.

The United States says that Idaho uses the filing fees it collects from the government and other claimants to finance water rights litigation against them. Idaho explains why the United States' statement is inaccurate, but the more puzzling question is why Idaho's present use of filing fees is relevant to what Congress intended in 1952 when it passed the McCarran Amendment. Whether Idaho uses the filing fees it collects for an allegedly improper purpose is separate from the question whether

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[12](...continued)

a private plaintiff, which would not include interest. *Id.*, at 319. The fact that Congress later authorized the United States to be sued as defendant in a Title VII action was not sufficient to expand the initial limited waiver. *Ibid.*

In the McCarran Amendment, however, no similar limitation inheres in the views expressed to Congress and reflected in the second sentence of the Amendment that the United States should take on "exactly the same status" as a private litigant. Moreover, to the extent *Shaw* recognizes that Congress' initial waiver exposed the United States to liability for all charges that could be assessed against a private Title VII plaintiff, *Shaw* cuts against the government. It means that Congress' comparable intent here makes the United States liable for all fees a private claimant would have to bear in a state water rights adjudication.

Congress regarded filing fees as a species of costs when it passed the McCarran Amendment. If correct, the United States' argument might bar Idaho from using the fees for one purpose, but it would not prevent Idaho from collecting them to defray non-adversarial expenses.

Similarly, the United States says that Idaho charges the United States a higher filing fee than it charges other water users. Idaho again explains the inaccuracies in the United States' argument. But the more troubling question is what relevance does the United States' argument have to congressional intent. The question whether Congress intended to waive sovereign immunity from filing fees is separate from the question whether a State is assessing those fees unequally. If the United States is correct, it may have a claim for unequal treatment but it does not have a claim that sovereign immunity prevents a State from collecting any filing fee from it.

Finally, the United States notes the high fees it must pay as part of Idaho's water rights adjudication. Fees, however, are tied to water use, and congressional acts passed long after the McCarran Amendment's waiver of immunity, such as the Wild and Scenic Rivers Act, 82 Stat. 906, as amended, 16 U.S.C. § 1271 *et seq.*, dramatically increased the volume of water the United States now claims. These subsequent increases may call into question the wisdom of Congress' earlier waiver, if in fact it waived immunity from filing fees, but they provide no legitimate basis for deciding whether Congress intended to exempt filing fees as well as costs when it enacted the McCarran Amendment in 1952. That statutory question is answered not by questioning the wisdom of Congress' policy choice but by looking to the language and the legislative history of the exemption.

The text of the McCarran Amendment provides no support for the federal government. It excepts "judgment[s] for costs" from the scope of the waiver. Nothing in the statutory language refers to filing fees, nor is there any reason on the face of the statute to think that Congress intended that a reference to "costs" would also include filing fees. The two are not synonymous. A judgment for costs typically is awarded at the end of litigation and shifts the winning party's costs to the losing party. Filing fees, on the other hand, typically are paid to the State at the beginning of the litigation regardless of whether the State claims any water rights. They are used not to shift costs between parties but to defray administrative or judicial expenses associated with the adjudication.[13]

Exceptions to broad waivers of sovereign immunity should be construed narrowly. *United States v. Nordic Village*, 112 S. Ct. at 1014. The text of the McCarran Amendment provides no reason to read the statutory reference to "costs" to mean anything other than what it says. Nor does the legislative history provide any reason to depart from the plain language of the Amendment. On this point, the United States suggests that when the McCarran Amendment was adopted Idaho and other western States used judgments for costs to fund their water rights adjudications. *See* Pet. Br. at 5–6 & n. 1. The point presumably is that Congress

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[13] Water resource agencies, while sometimes nominally designated as parties to the adjudication, are not litigants in the traditional sense. Their technical and administrative services are provided not in the adversarial posture of litigating parties, but as a means to provide due process and to generate information necessary for all claimants to prepare their claims and litigate contested issues. *See, e.g., United States v. Superior Court in and for Maricopa County*, 144 Ariz. 265, 697 P.2d 658, 672 (1985). Although some state government entities may submit claims for certification, the water resources agency is not an advocate for those claims, and the claiming agency pays filing fees according to the same schedule as other claimants.

would have understood that excepting "judgment[s] for costs" from the McCarran Amendment also excepted any charge (whether called a fee or a cost) for the same expenses.

The problem with the United States' suggestion is that it rests on an incorrect factual premise. When the McCarran Amendment was adopted, many States distinguished between filing fees, which were used to defray the administrative expenses for water rights adjudications, and judgments for costs, which were assessed against the losing party. For example, the Oregon statutes governing water rights adjudications have distinguished filing fees from judgments for costs since they were first enacted in 1909. *See* 1909 Or. Laws 319. Under settled Oregon law, every person who claims water rights in a state water adjudication is required to pay a filing fee based roughly on the amount of water he or she uses. *See* Or. Comp. Laws § 116-807 (1940); *Pacific Live Stock v. Lewis*, 241 U.S., 440, 452 (1916). Judgments for costs, by contrast, are available against claimants who file an exception in state court to the state water agency's determination of the parties' water rights,[14] and the decision whether to enter a judgment for costs against a party to the judicial proceedings is discretionary with the court. Or. Comp. Laws § 116-814 (1940).[15]

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[14] Under the Oregon statutes, the state water agency determines the various claimants' water rights and files the determination with the circuit court. A claimant who is dissatisfied with the determination may file an exception to the determination in state court, and the court will resolve the issue raised by the exception.

[15] Although the United States says that Oregon recovers its administrative expenses as part of the judgment for costs, Pet. Br. 6 n. 1, it misperceives Oregon law. The Oregon statute it cites to support this proposition was enacted in 1905, *see* 1905 Or. Laws 402, and effectively superseded when Oregon adopted a comprehensive system for water rights adjudication in 1909, *see* 1909 Or. Laws 319.

Oregon's use of filing fees was perhaps one of the most widely known, having been sustained by this Court in *Pacific Live Stock Co. v. Lewis*, *supra*. One of the claims raised in *Pacific Live Stock* was that Oregon's graduated filing fee was extortionate and thus violated due process principles. In rejecting that claim, the Court recognized that Oregon's filing fees were used to defray the "'expense of the state of the investigation, mapping, taking testimony, and other acts in the determination of the claimant's rights... .'" 241 U.S., at 452. It held that the fees were neither extortionate nor in violation of due process. The decision is relevant here not so much for its constitutional holding, but for the recognition resulting from the Court's discussion of Oregon's system. Indeed, even though *Pacific Live Stock* was decided approximately 36 years before Congress enacted the McCarran Amendment, Congress was well aware of the case and quoted it to describe the purposes state water rights adjudications served.[16] S. Rep. No. 755, 82d Cong., 1st Sess., 5 (1951).

Oregon was not alone in distinguishing assessments or fees to recover the administrative expenses of investigating water rights claims from judgments for costs. When the McCarran Amendment was enacted,[17] Arizona and Nevada, Senator McCarran's home State, also distinguished graduated filing fees to recover the administrative agency's investigative expenses

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[16] The Senate Report does not cite that portion of the decision that discusses filing fees, but it does quote part of the decision that discusses the important purposes state water rights adjudications serve.

[17] The following discussion of state statutes is based on the statutes in effect when the McCarran Amendment was passed. It does not necessarily reflect present state water laws. Copies of the statutes or session laws cited are included as exhibits in the record. *See* Idaho Exhibits 243-268.

from judgments for costs.[18] California similarly imposed a five dollar filing fee on each claimant and provided that if the total filing fees collected were not sufficient to cover the administrative agency's investigative expenses, the additional expenses would be apportioned among the water rights claimants and collected separately from the judgment for costs.[19] Other States assessed set filing fees or no filing fees, but did not seek to recoup the expenses the state administrative agencies incurred in performing non-adversarial, investigative services as part of the judgment for costs.[20] Montana, for example, directed that these expenses be borne by the State. *See* Mont. Code Ann. § 89-851 (1947) (costs and expenses incurred by state engineer to be paid

[18] *See* Ariz. Code § 75-122 (1939) (judgment for costs); Ariz. Code § 75-137 (1939) (graduated filing fees for submitting proof of appropriation); Nev. Comp. Laws § 7914 (1930) (graduated filing fees for submitting proof of appropriation); Nev. Comp. Laws § 7922 (1930) (judgment for costs).

[19] The California statutes required the state agency to compute its expenses and apportion any expenses incurred (over and above the filing fees collected) among the claimants. 1943 Cal. Stat. 1641 (§§ 2851 and 2852). The additional expenses or apportionment was assessed and collected separately from the judgment for costs. The apportionment was due when the state agency sent a statement of the additional investigative expenses to the claimants. 1943 Cal. Stat. 1641 (§§ 2853 and 2854). If a claimant objected to the apportionment, the state court would enter a final order determining what apportionment the claimant owed, and the order was due and payable directly to the state agency. 1943 Cal. Stat. 1641–42 (§§ 2857-2860). If the apportionment remained unpaid when the final judgment was entered, it would be included in the judgment. 1943 Cal. Stat. 1642 (§ 2861). A judgment for costs, by contrast, was a separately assessed charge that was discretionary with the court. 1943 Cal. Stat. 1638 (§ 2770).

[20] *See* Colo. Rev. Stat. § 147-9-19(4) (1953) (five dollar filing fee); Colo. Rev. Stat. § 147-9-19 (authorizing recovery of typical court costs but not investigative expenses); Kan. Stat. Ann. § 82a-704 (1949); Neb. Rev. Stat. § 46-232 (1952) (set filing fee of seventy-five cents; no express provision for entry of judgment for costs); S.D. Codified Laws § 61.0119 (expressly providing that state investigative expenses shall not be taxed as costs to private parties without their consent).

by state water conservation board). Although the state statutes did not all look in the same direction when the McCarran Amendment was enacted,[21] a majority of the States used some mechanism other than judgments for costs to recover these administrative expenses.

Contrary to the United States' suggestion, there was no uniform pattern of state laws in 1952 that would show that Congress understood that the phrase "judgment for costs" would include filing fees like Oregon's or other state methods of assessing each claimant with the administrative expenses of investigating their water rights claims. Rather, the pattern of state laws proves, if anything, that Congress would have understood that excepting only "judgment[s] for costs" from the McCarran Amendment's broad waiver of sovereign immunity left the United States responsible for paying all other fees and assessments charged water rights claimants.

The same conclusion follows from the Senate Report explaining the McCarran Amendment. The report notes that "[e]ach water user under some State laws is required to pay a graduated fee or tax annually for the services of water commissioners." S. Rep. No. 755, 82d Cong., 1st Sess., 5 (1951). It explains that those services included apportioning water to decreed users and enforcing compliance with a water user's decreed rights through administrative and judicial orders. *Ibid.* The Report reasons that unless the United States is subject to state laws and state process for the administration of water rights, then "the years of building the water laws of the Western States

[21] *See* Idaho Code § 42-1401 (1948) (administrative expenses "shall constitute part of [the] costs and disbursements"); N.M. Stat. Ann. § 77-409 (1941) (costs of hydrographic survey entered as judgment for costs); N.D. Cent. Code § 61-0317 (1943) (same); Okla. Stat. § 82-13 (1951) (same).

. . . to effect honest, fair and equitable division of the public waters will be seriously jeopardized." *Ibid.* As the Report concludes, "it is essential that each and every owner along a given water course, including the United States must be amenable to the law of the State, if there is to be proper administration of the water law as it has developed over the years." S. Rep. 755, *supra*, at 8.

The Senate Report thus recognizes that the United States should be required to follow state law for the administration of water rights, which would include the requirement in some States that each user pay fees for the services of the water master. Although the passage focuses on the administration of water rights, there is no reason to assume that Congress intended to require the United States to pay fees for administration but not adjudication of water rights. The McCarran Amendment consents to joinder in suits for both adjudication and administration, and it provides that the United States' sovereign immunity will not be a bar to the application of state law in "any such suit." In the States' view, the legislative history provides no support for the proposition that the exception for costs also was intended to except filing fees from the McCarran Amendment's broad waiver of sovereign immunity. Rather, the legislative history confirms that the exception set out in the proviso is as narrow as the words Congress chose.

CONCLUSION

For the reasons set out above, the Supreme Court of Idaho's judgment should be affirmed.

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